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IN THE

Supreme Court of the United States

October Term, 1959

No. 477

ROBERT W. KEELEY, *et al.*,

Petitioners,

— v. —

BOARD OF EDUCATION OF THE CITY OF NASHVILLE, DAVIDSON COUNTY, TENNESSEE, *et al.*,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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BOARD OF EDUCATION OF THE CITY OF NASHVILLE, DAVIDSON COUNTY, TENNESSEE, *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled case on June 17, 1959.

Citations to Opinions Below

The several opinions by the United States District Court for the Middle District of Tennessee in this case have been reported as follows:

a. Opinion, March 28, 1956, reported at 139 F. Supp. 578;

b. Memorandum Opinion, January 21, 1957, reported at 2 Race Rel. Law R. 21 (R. 46a);[1]

[1] The abbreviation "R." used herein refers to the record filed with this petition which consists of the printed appendices filed by the

c. Statement from the Bench, September 6, 1957, reported at 2 Race Rel. Law R. 970 (R. 67a);

d. Opinion, February 18, 1958, reported at 159 F. Supp. 272 (R. 88a);

e. Memorandum Opinion, June 19, 1958, reported at 3 Race Rel. Law R. 652 (R. 236a).[2]

The opinion of the United States Court of Appeals for the Sixth Circuit, printed in the Appendix hereto, *infra*, pages 37-80, has not been reported.

Jurisdiction

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on June 17, 1959 (R. unnumbered pages following 66b) and is printed in the Appendix at page 81. The jurisdiction of this Court is invoked under Title 28, U. S. C., §1254(1). On September 10, 1959, Mr. Justice Stewart extended the time for filing this petition to and including October 15, 1959.

Question Presented

Whether petitioners, Negro school children in Nashville, Tennessee, have been deprived of rights conferred by the due process and equal protection clauses of the

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parties in the court below and the proceedings in the court below. Record pages 1a-246a are contained in the appendix of appellants below, and pages 1b-66b are contained in the appendix of appellees below.

[2] Connected proceedings involving an injunction obtained by respondents to restrain the unlawful acts of certain persons opposing desegregation in Nashville are reported at 2 Race Rel. Law R. 976, *et seq.* A statement of the Court from the Bench (on September 16, 1957) is reported at 2 Race Rel. Law R. 980.

Fourteenth Amendment to the Constitution of the United States by the judgment of the court below, approving respondent local school board's plan which:

1. While permitting some desegregation for Negro children in years to come, effectively denied to petitioners and the class they represent—other Negro children then attending public schools—any enjoyment, present or future, of their rights recognized in the *Brown* and *Cooper* decisions;

2. Based this denial on the hostility of the community to the principle of desegregation set forth in the *Brown* case;

3. While the record merely suggests perhaps two factors other than hostility (the possible desirability of homogeneous grouping of students and teacher recruitment problems), made no showing whatsoever that any protracted period of years to cope with such matters was needed;

4. Explicitly recognized race as an absolute ground for the transfer of students between schools, thereby perpetuating rather than eliminating racial discrimination.

Constitutional and Statutory Provisions Involved

This case involves Section 1 of the Fourteenth Amendment to the Constitution of the United States.

Statement

The complaint was filed on September 23, 1955 in the United States District Court for the Middle District of Tennessee, Nashville Division, by petitioners, a group of Negro children then attending the public schools of the

City of Nashville, Tennessee, and their respective parents as next friends and individually, for themselves and for others similarly situated,* against respondents, the Board of Education of the City of Nashville and its members, the Superintendent of Schools of the City of Nashville, and principals of several schools in the city school system (R. 4a-13a). The complaint prayed for a declaratory judgment that certain laws of Tennessee which required the segregation of white and Negro children in public schools violated the Fourteenth Amendment to the Constitution of the United States, and for an injunction restraining the respondents from excluding petitioners and others similarly situated from public schools in the City of Nashville on account of their race (R. 12a).

The complaint invoked the jurisdiction of the District Court pursuant to 28 U. S. C. §§1331, 1343, and 42 U. S. C. §§1981, 1983 (R. 4a), requested the convening of a three-judge district court pursuant to 28 U. S. C. §§2281, 2284, and sought declaratory relief pursuant to 28 U. S. C. §§2201, 2202 (R. 4a-5a).

The allegations of the complaint briefly summarized are: that the State of Tennessee had declared public education a state function and established within the state a "system of free public education"; that the respondents supervised and controlled the free public schools of the City of Nashville as agents of the State of Tennessee; that the respondents had established and maintained in said City a number of public schools exclusively for the education of white children and that all Negro children were excluded from these schools and required to attend certain schools maintained exclusively for Negro children; that the

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*Pursuant to Rule 23 (a) (3) Federal Rules of Civil Procedure (R. 5a).

petitioners had sought admission to certain of the schools maintained for white children and had been denied admission thereto by respondents because of their race or color; that the action of respondents had been pursuant to and in reliance upon certain specified provisions of the Constitution and laws of the State of Tennessee which compelled racial segregation of public school children; and that enforcement of the aforesaid laws by respondents deprived petitioners and others similarly situated of rights protected by the Constitution and laws of the United States. Subsequently, two white children and their respective parents who had been denied admission to schools maintained exclusively for Negroes were added as parties-plaintiff, and the complaint was amended accordingly (R. 57a).

Respondents' answer admitted the jurisdiction of the District Court, admitted the allegations with respect to their supervision and control of the Nashville schools and the operation of racially segregated schools, admitted that petitioners were excluded from certain of the schools because of their race, and conceded the invalidity of the state laws requiring racial segregation in the schools (R. 14a-17a). Respondents asserted affirmatively that they intended in good faith to implement the decision of the Supreme Court in the *School Segregation Cases*: that they had designated a committee to study the problem, which committee had submitted two progress reports, and that more time was needed to formulate a plan for compliance.

On March 28, 1956 the cause came before a three-judge district court on respondents' motions to dissolve the three-judge court and for a continuance. The motion to dissolve was granted on the ground that the invalidity of the state constitutional and statutory provisions challenged was conceded by respondents. A continuance was granted until the

October 1956 term upon respondents' representations that they needed time to formulate a plan for compliance. 139 F. Supp. 578.

At the October 1956 term of court respondents moved for a further postponement until after the 1957 session of the Tennessee legislature. This motion was denied and the case set for hearing in November 1956 (R. 69a). Thereupon, respondents filed a supplemental pleading setting forth their proposed plan for an "initial step to comply with the decision of the Supreme Court of the United States" to be effectuated on September 1, 1957 (R. 32a, 36a-37a). The initial plan provided for: (1) abolition of compulsory segregation in Grade One of the elementary schools beginning in September 1957; (2) the establishment of school zones without reference to race for Grade One, based on a school census and the location of buildings; (3) permitting every student in Grade One to attend the school in the zone of his residence; (4) the consideration and granting of applications for transfer of first grade pupils from the school of their zone to schools outside their zone for good cause shown; (5) transfers to be granted to white or colored students who would otherwise be required by the zoning system to attend a school previously serving only students of the other race, or who would otherwise be required by the zoning system to attend a school "where the majority of students in that school or in his or her grade are of a different race"; and (6) for further committee study and recommendations by December 1957 with respect to the next step in abolishing segregation.

Oral testimony was heard and received by the court on November 13-14, 1956 (R. 38a-48a; 195-50b). The Court entered a Memorandum Opinion, January 21, 1957 (R. 46a-56a), Findings and Conclusions (R. 57a-64a) and its Judgment (R. 65a-66a) on February 20, 1957. The district

court approved the plan for the initial step in compliance, except for paragraph six which was disapproved, and directed the respondents to submit, not later than December 31, 1957 a complete plan to abolish segregation. The Court issued no injunction but retained jurisdiction.

Immediately preceding the beginning of the 1957-58 school term, respondents on August 30, 1957 filed a motion for leave to file a Supplemental Answer and Counterclaim, which alleged that Chapter 11, Public Acts of Tennessee for 1957, authorized the establishment of separate schools for white and Negro children whose parents elect that such children attend schools with members of their own race, that petitions had been received from parents urging the establishment of such separate schools, and praying that the previous judgment of the court concerning desegregation of the first grade be suspended, modified, amended or vacated and for a declaration of the rights of the parties (R. 1b-12b). After argument, the District Court denied the motion (R. 67a-81a), ruling that the statute relied upon by respondents was "on its face antagonistic to the principles declared by the Supreme Court in the two Brown cases and [was], therefore, unconstitutional" (R. 75a).

In September 1957, nine or ten Negro children were admitted to first grade classes in previously all-white schools (R. 83a; 52b). The opening of classes was attended by the attempts of some persons to interfere with the desegregation of the schools through acts of violence, intimidation, coercion and incitement, including the damaging of one school by dynamiting (R. 53b-54b). The respondent board and the City of Nashville, instituted ancillary proceedings and obtained a temporary restraining order and a preliminary injunction prohibiting ten or more known persons from further interfering with the Board of Education, its employees and the school children (R. 60b-66b).

These connected proceedings are reported at 2 Race Rel. Law R. 976 *et seq.*, see footnote 2, *supra*, page 2.

On December 6, 1957 respondents filed a Report which contained another proposed plan (R. 13b-16b), and petitioners filed objections to the plan (R. 17b-18b). The new plan contemplated the establishment of a system of three types of schools (schools for Negroes exclusively, schools for whites exclusively, and "integrated" schools) which was substantially the same as the system contemplated by Chapter 11, Public Acts of Tennessee for 1957, which had theretofore been ruled invalid by the District Court. Subsequently, on January 20, 1958, and before hearing on the plan, respondents filed also a Motion to Dismiss the action on the ground that the Pupil Assignment Act, Chapter 13, Public Acts of Tennessee for 1957, provided an administrative remedy for petitioners to obtain admission to particular schools which should be exhausted before resorting to the court for injunctive relief (R. 91a). Further evidence and arguments were presented January 28, 1958 (R. 82a-87a; 50b-59b). The Court filed an opinion February 18, 1958 (R. 88a-102a; 159 F. Supp. 272), and an Order on March 19, 1958 (R. 103a-104a) denying the motion to dismiss, disapproving the proposed plan, withholding issuance of an injunction, and directing the Board of Education to present another plan not later than April 7, 1958. The Court denied the motion to dismiss on the ground that the Pupil Assignment statute relied upon by respondents did not afford an adequate remedy to secure the relief sought since the respondents were committed to a policy of segregation in all grades but the first (R. 91a-97a; 159 F. Supp. 272, 275-277). The plan was disapproved on the ground that it would require racial segregation in certain schools (R. 98a-101a; 159 F. Supp. 272, 278-279).

On April 7, 1958, respondents submitted another plan to the Court (R. 236a-237a). This plan provided for: (a) abolishing compulsory segregation in Grade Two in September 1958, and one additional grade each succeeding year; (b) application of the zoning and transfer provisions which were contained in the plan submitted in November 1956, to each successive grade in which segregation was abolished; and (c) advising the Court of progress and problems at such intervals as the Court directed.

A hearing was conducted on the plan on April 14, 1958, and testimony was offered for the respective parties (R. 105a-235a). The testimony offered at the hearing is summarized in the opinion of the Court of Appeals of June 17, 1959 (Appendix, *infra*, pp. 45-65). The Superintendent of Schools, the Chairman of the Board of Education, the principal of an elementary school, and the then recently retired Superintendent of Schools presented respondents' testimony. Each stated as a principal reason for the adoption of the plan the belief that this was the best plan for the community, and that this plan would incur less objection and resistance from those (including parents, children and teachers) who opposed desegregation of the schools than any other method (R. 112a-116a, 126a, 132a-133a, 145a, 152a, 155a-156a, 165a-166a).

Testimony concerning respondents' reasons for having adopted its plan appears over more than a hundred pages of the record (106a-170a, 19b-59b). With the exceptions set forth hereafter this testimony was concerned largely with hostility or antipathy to desegregation. For example, the following may be quoted:

W. H. Oliver (Superintendent of Schools):

"But right to the question, I'd say in the first place I think this is the best plan because it would incur the

least opposition, the smallest number and size of difficulties to deal with. Judging from past experience, there are difficulties encountered in this process of desegregation" (R. 112a).

* * * * * *

"A. If I may explain it this way, I think there is a great deal of violent reaction and opposition we are going to encounter from the people in our community, and I think that if it is distributed over a period of years, we can take it better.

" . . . One reason why I think the year-by-year plan is best is that I think that there will be a good bit of reaction against it and opposition to it and that that reaction will be easier to deal with and will be less violent if it is distributed over a period of years. And the principal person I am pleading for there is the child himself" (R. 126a).

* * * * * *

"Q. My question was directed towards your opinion or rather how the public acceptance or public rejection affected your plan? A. Well, I think that one reason for favoring this plan is that it will be less objectionable to the people.

"Q. That is one of your primary objections? A. I may have been a little too brief in answering that. Of course, what I'm thinking about is not so much the objection of the people but the results of that objection on the work of the schools" (R. 127a).

* * * * * *

Elmer Lee Pettit (Acting Chairman of the School Board):

"Q. Well, sir, I think you testified—or did you testify that you thought the majority of the community

was in favor—was against desegregation? A. I didn't say that. I think it's— It's probably generally believed that most of the white people are against it, and I can't speak for other people.

"Q. Is that why you thought—you testified that you thought the wisest plan was a gradual plan to go up one year at a time, that the Board thought that? A. That is one reason. Surely" (R. 145a).

* * * * *

MARY BRENT (Principal):

"Q. Miss Brent, since September 1957, state whether or not there has continued to exist a tension in your school and in your school constituency? A. Yes, sir; there has. We have managed, since there are only the two children. We have fairly well managed to keep it down within the school itself, but it's mostly on the outside that we have felt it. The two Negro children are brought to school each day and are taken home by one or other of the parents. That's one thing.

"There have been two or three incidents within the school that older children had brought about. As far as the children with their own first grade group, they are well accepted. Things have gone on fairly smoothly, but with the older children we have had some trouble.

I myself have been the brunt of several pretty bad things. I mean such as anonymous telephone calls and calling me different names that a lady doesn't appreciate. And for the first—I'd say the first six weeks, there was a constant stream of parents in and out of the school putting up the arguments to me that I had listened to most of the summer; and sometimes they would go away satisfied, sometimes they would not. Some of them have never come back into the school since that time" (R. 152a).

The Court of Appeals' opinion commences with a lengthy recital of hostility and violence which occurred in Nashville, which that Court described as "pertinent":

> The background of the case is pertinent: The entry of the judgment approving the above plan of desegregating the first grade and compliance therewith by the Board of Education and the school authorities gave rise to violence on the part of criminal elements opposed to desegregation, who wrecked a city school by bombing, and destroyed a synagogue by the same means. Unlawful crowds of disorderly persons caused great trouble and turbulence until the district court restrained one Kasper and others, by injunction, from acts of violence, intimidation, coercion, and incitement. In granting the injunction, the district court declared that the action of the Board of Education in putting into effect the order and judgment of the court 'precipitated a situation in the City of Nashville which very nearly approached for some several hours' time—if not for several days' time—a reign of terror, certainly a reign of terror among those parents having children in the public schools, particularly in the first grade schools. * * * [If] it had not been for the decisive way that the City authorities went about discharging their duties, the reign of terror which overwhelmed the City would have been much worse than it actually was.' It was the Board of Education of the City of Nashville that, when the trouble started, immediately pressed for the injunction against the acts of violence and coercion; and it was the police of the City of Nashville that curbed the acts of intimidation and enforced public order. It is to be remarked that none of the illegal acts, riotous conduct, or inflammatory propaganda hampered either the district judge or the Board of Education in carrying out their duties, firmly and

swiftly, in the face of terroristic threats and disorder that characterize such unlawful groups in every part of the country where riots, arising from any cause, have, in the past, occurred.

The evidence other than that of hostility consisted of the Superintendent's testimony regarding homogeneous grouping:

"and another reason is that it will give us a more homogeneous grouping of students. At least, it will make possible a more homogeneous grouping of students" (R. 115a).

"If homogeneous grouping has any value, then we can get the greatest value out of it by a gradual plan" (R. 114a).

" . . . the matter of homogeneous grouping is something which we have been dealing with in Nashville for a good many years. . . . We don't know what is the best thing to do. . . . The question of homogeneous grouping will—is one which will continue with us" (R. 124a).

"In fact, I wouldn't consider that [race] as the principal fact that I had in mind [grouping children homogeneously]" (R. 125a).

There also was testimony concerning teacher recruitment:

W. A. Bass (former Superintendent):

" . . . I have discovered that many teachers who might offer their services as teachers decline to teach in a desegregated school system" (R. 37b-38b).

In addition, there was testimony, in general terms, that administrative difficulties might be presented by the new

racial transfer plan (R. 39b), the constitutionality of which petitioners challenge herein. See page 30, *infra*.

It fairly may be said that there was no substantial elaboration of these statements and that there was no testimony at all indicating the time factors related to solution of these problems.

Petitioners' witnesses were a psychologist and two sociologists, all of whom held or had held college teaching positions and had done research, writing and consultative work in the field of race relations and desegregation (R. 171a-175a, 195a-196a, 208a-209a). Petitioners' fourth witness was the lone Negro member of the Nashville Board of Education (R. 222a). These witnesses testified that experience with desegregation in several localities demonstrated that delay increases rather than decreases community antagonism (R. 177a-178a, 197a-200a, 210a-211a). They stated that delay creates doubts and resistance in the public mind (R. 177a-178a); further confusion is engendered by singling out particular grades for desegregation and breaking up family units (R. 198a-199a). Conversely, in communities where desegregation was accomplished rapidly, tensions were minimized (R. 178a, 210a-211a). Expressed attitudes against desegregation did not manifest themselves in action (R. 211a) and the apprehensions of teachers that desegregated classes could not be taught successfully proved unwarranted (R. 174a).

Two of petitioners' witnesses contended that desegregation should take place immediately (R. 210a, 243a), while two others suggested that it could be accomplished by functional units in a two- or three-stage plan (R. 206a, 233a). All of petitioners' witnesses, however, opposed the twelve year program (R. 177a-178a, 197a-200a, 210a, 222a) and none stated a belief that desegregation could not practicably be put into effect immediately.

After the hearing, the Court entered an opinion on June 19, 1958 (R. 236a-240a), and on July 17, 1958 entered Findings of Fact and Conclusions of Law (R. 241a-245a) and a Judgment (R. 246a), approving the plan and denying injunctive relief. The court retained jurisdiction during the period of transition.

Petitioners appealed the judgment approving the plan and denying injunctive relief, and respondents cross-appealed asserting that the district court had erred in rejecting their earlier plan (R. 13b-16b) for three groups of schools.

The appeal and cross-appeal were argued and submitted to the United States Court of Appeals for the Sixth Circuit, and that Court affirmed the judgment of the District Court on June 17, 1959.

REASONS FOR GRANTING THE WRIT

Summary of Reasons for Granting the Writ

Four years after the second opinion in the *Brown* case growing amount of litigation seeking enforcement of the principle of desegregation in public schools has been disposed of in one of two ways: pupil assignment plans and twelve year stair-step plans. It is becoming increasingly evident that this Court should give guidance to the lower courts in considering plans, which at first blush, might appear to be an easy and yet satisfactory compliance with this Court's opinions in *Brown* and *Cooper* and at the same time be least distasteful to those who are in disagreement with the principle of desegregation.

The decision below conflicts with *Brown* v. *Board of Education*, 347 U. S. 483, 349 U. S. 294 and *Cooper* v. *Aaron*, 358 U. S. 1, in salient respects. All of the petitioners herein

were wholly denied any desegregated education whatsoever by the decision below. The *Brown* and *Cooper* cases, which control, while suggesting grounds upon which a board may sustain its burden of justifying some delay, certainly did not establish any ground upon which relief might be postponed indefinitely.

Moreover, a class suit is one in which a plaintiff, who secured relief, thereby also gains a similar right for others, not a suit in which plaintiff is held ineligible for relief which is thereby conferred on future members of the class.

But beyond violating the holdings of *Brown* and *Cooper* by denying relief, the court below did not have justification for even delaying relief. Delay is permissible only to permit adjustments of the nature detailed in said opinions. No substantial problems of such kind were advanced by respondents. Their singular ground for delay, detailed time and again, was opposition to desegregation. The Court of Appeals deemed this objection "pertinent" and prominently detailed such evidence in its opinion although acknowledging the rule of *Brown* and *Cooper* that considerations of this sort are immaterial. But this Court, under long established precedent, evaluates the record itself in so far as constitutional rights are concerned and should find, petitioners submit, that the rationale of the holding below was that hostility justified denial and delay. The administrative factors adduced by respondents did not justify protracted delay. There was no evidence whatsoever concerning their justifying twelve years' delay or delay for any particular or general duration.

The transfer plan which embodies explicit racial criteria is unconstitutional. Race may not be used as a standard for governmental action. Moreover, in the context of this case, this transfer plan tends to perpetuate segregation.

This Court, therefore, should grant certiorari and upon consideration thereof, should vacate the judgment below and direct that the court below reconsider the record in the light of *Brown* and *Cooper*, exclude from its consideration all evidence of hostility to desegregation, relate the time during which desegregation is to occur to valid grounds for delay, and order that plaintiffs herein be awarded relief.

I.

The decision below approves a plan which denies to petitioners an opportunity to ever obtain rights guaranteed by the *Brown* and *Cooper* decisions and therefore conflicts with those decisions.

Brown v. *Board of Education*, 349 U. S. 294, 298, established the principle that upon "adjusting and reconciling public and private needs" (*Id.* at 300), "the personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis" might be deferred to "take into account the public interest in the elimination of [certain specified types of] obstacles in a systematic and effective manner."

Cooper v. *Aaron*, 358 U. S. 1, 7, further described the duty incumbent on school boards and the standards by which courts were to judge board action:

> . . . the District Courts were directed to require 'a prompt and reasonable start toward full compliance,' and to take such action as was necessary to bring about the end of racial segregation in the public schools 'with all deliberate speed.' Ibid. Of course, in many locations, obedience to the duty of desegregation would require the immediate general admission of Negro children, otherwise qualified as students for their ap-

> propriate classes, at particular schools. On the other hand, a District Court, after analysis of the relevant factors (which, of course, excludes hostility to racial desegregation), might conclude that justification existed for not requiring the present nonsegregated admission of all qualified Negro children. In such circumstances, however, the Court should scrutinize the program of the school authorities to make sure that they had developed arrangements pointed toward the earliest practicable completion of desegregation, and had taken appropriate steps to put their program into effective operation. It was made plain that delay in any guise in order to deny the constitutional rights of Negro children could not be countenanced, and that only a prompt start, diligently and earnestly pursued, to eliminate racial segregation from the public schools could constitute good faith compliance. State authorities were thus duty bound to devote every effort toward initiating desegregation and bringing about the elimination of racial discrimination in the public school system.

Those decisions certainly did not establish the rule that constitutional rights might be wholly and irremediably denied. Yet so far as the petitioners—all of whom were in school at the time of suit—are concerned, the judgments below do just that. None of those who went to court to secure their rights will ever experience a day of desegregated public education in Nashville. This, petitioners submit, makes a mockery of equal justice under law.

The "good faith" of the school board is not the determinative factor in considering the validity of the plan. Rather, it is the end result which is controlling. Good faith can not be used as an excuse for unlawfully postponing

enforcement of rights guaranteed by *Brown*. See *Cooper* v. *Aaron*, 358 U. S. 1, 15.

All of the named minor petitioners were children who were already attending public schools in the City of Nashville. Indeed had they not been students they surely would have had to face the argument that they had no standing to sue or that suit was premature. See *Doremus* v. *Board of Education of the Borough of Hawthorne*, 342 U. S. 429 (plaintiff graduated); *Tate* v. *City of Eufala*, 165 F. Supp. 303 (M. D. Ala. 1958) (may not be presumed that defendants will discriminate in the future).

By the very nature of the "year-by-year plan" of desegregation, which begins in the first grade and proceeds to desegregate succeeding grades one year at a time, no child making normal progress from grade-to-grade who attended school prior to the commencement of the plan, may ever attend a desegregated class in the public schools. Thus, the only relief that these litigants obtain through the judicially approved plan, is the satisfaction they may gain from being instrumental in securing governmental respect for the constitutional rights of others. However real and substantial such satisfaction may be, it is no legal substitute for judicial protection of these litigants' "personal" constitutional rights.

This Court recognized in the second opinion in the *Brown* case that equity courts should exercise practical flexibility in "reconciling public and private needs." But the plan in the instant case does not "adjust or reconcile" the needs of the immediate litigants. To the contrary, it ignores them and makes no provision for them ever to escape discrimination in the system. This is not consistent with this Court's recognition that—"At stake is the personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis."

The fact that this is a representative class action, and that petitioners brought this litigation on behalf of themselves and all others similarly situated who were suffering discrimination, does not justify the result. It is no answer to petitioners' claim that they are entitled to a personal freedom from discrimination, to say to them that the respondents have stopped discriminating against others. Indeed, the commonly accepted concept of a class suit is one in which plaintiff vindicates his rights and others may secure similar relief. It is unprecedented, petitioners submit, for a judgment to provide that others may secure relief upon petitioners' suit, but petitioners shall not.

It is submitted that a plan which makes no provision for any of the pupils in the school system prior to the time the plan is commenced, and thus gives no consideration or hope to the parties and the large part of a generation of students, cannot satisfy the requirement that authorities proceed with "all deliberate speed" to end discrimination in public education. In other words, a plan which completely ignores the rights of the named petitioners and others similarly situated—students then in school—does not meet the requirements of the *Brown* decision.

II.

Moreover, the record contains no justification for delay cognizable under decisions of this Court.

There are, of course, no valid grounds upon which the rights involved herein may be denied, but neither did the record present any legally cognizable grounds for delaying constitutional rights beyond the three years this case had been pending. Each of the witnesses for respondents in the trial court clearly indicated on direct examination (some of them also so indicated on cross-examination) that the factor of hostility to desegregation and the extent of racial prejudice among the various groups to be affected by school desegregation, was a basis for the adoption of the proposed plan, as well as each witness' support of the plan. No reading between the lines is necessary to ascertain this; these views were directly and openly expressed and quite evidently represented respondents' theory of the case.[4]

Four witnesses testified in support of the plan. They were the Superintendent of Schools (R. 107a-129a, 228a-233a), the chairman of the Board of Education (R. 129a-150a), a public school principal (R. 150a-159a), and the retired Superintendent of Schools, who had participated in formulating the plan (R. 159a-170a). The Superintendent of Schools testified at length about opposition to desegregation in the community and his view that this plan would encounter the least opposition and violent reaction among those who were opposed to desegregation, as well as the effects of the desegregation controversy on race relations in the community and the effects of objection to desegregation on the work of the schools. Part of such testimony

[4] Perhaps the basic error in the record below is that the testimony of violence and hostility was admitted into evidence. See *City of Birmingham* v. *Monk*, 185 F. 2d 859 (5th Cir. 1950).

is quoted in the Statement, *supra;* other examples may be found on the following pages of the record: 112a, 113a, 114a, 116a, 126a, 127a.

The Chairman of the Board testified principally concerning his views as to the efficacy of the plan in minimizing tension within and outside of the schools, and his view that this was the wisest plan because of the opposition to desegregation among various elements. This testimony may be found at record pages 132a-133a, 145a.

The elementary school principal testified as to the tension in her school following limited desegregation, about the resistance of parents to desegregation, about problems created by older childrens' disorderly behavior, and her beliefs that younger children are less conscious of racial differences than the older children, and that desegregation immediately in the higher grades would bring "trouble." See record pages 152a, 155a-156a, 157a-159a.

Finally, the retired Superintendent of Schools stated his view that segregation should be ended very gradually because of the resistance among the teachers and others in the community. The witness recounted an incident that had occurred when he first became Superintendent (apparently some twenty years ago) at which white teachers refused to sit next to Negro teachers at a meeting, and that it took ten years until teachers and supervisors would sit down together and talk in confidence. The witness also testified concerning his discussions with parents dissatisfied with desegregation, and the difficulties encountered by a Negro parent in registering his child at a white school because of a crowd of persons gathered outside the school. See record pages 161a-163a, 165a-166a.

The District Court specifically recognized and referred to the witnesses' consideration of opposition to desegregation. The court wrote that:

> "[Respondents] are convinced that the change-over from a segregated system of public education in this particular area of the south is one of such drastic character, such a reversal of custom, tradition and settled practice, that disagreement with it is pervasive, far-reaching and deep seated. It is their opinion that proper school administration requires that the School Board in devising a plan should take into account the existence of this factor in order to minimize its effects upon the efficiency of the schools" (R. 237a-238a).

The Court of Appeals held this testimony "pertinent" and bestowed upon it the position of first importance in its opinion. It clearly and at length recognized the presence in the record of the great deal of testimony attempting to justify the plan on the basis of minimizing the effect of community attitudes and opposition among parents, pupils and teachers. The courts below did recognize and quote from *Cooper* v. *Aaron*, 358 U. S. 1, but, petitioners submit, while the opinions do not explicitly avow that hostility and violence are constitutionally valid grounds for denial and delay and may be considered in the absence of persuasive administrative problems, those factors were in fact the dispositive factors.

III.

Contrary to the *Brown* and *Cooper* decisions no rational connection was demonstrated or suggested by respondents between the few problems mentioned which did not directly result from racial prejudice or hostility to desegregation, and the period of delay prescribed in the proposed plan to solve the problems of desegregation.

This Court decided in *Brown* v. *Board of Education*, 349 U. S. 294, that in school segregation cases, the federal courts, after requiring "a prompt and reasonable start toward full compliance," could permit local school authorities additional time "to carry out the ruling in an effective manner," where they established "that such time is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date" (349 U. S. at 300). This Court had described the types of problems related to public school administration which the courts could consider in determining whether time should be granted, including problems arising from:

a. "the physical condition of the school plant";

b. "the school transportation system";

c. "personnel";

d. "revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis";

e. "revision of local laws and regulations which may be necessary in solving the foregoing problems" (349 U. S. at 300-01).

Which of the factors testified to by respondents fall in these types of categories?

The Superintendent of Schools of Nashville testified that the school system was attempting to achieve, to some extent, "homogeneous grouping" of the same classes of students with similar backgrounds, qualifications and capacities (R. 115a-116a, 124a-125a). The direct testimony of the witness indicates that no complete system of homogeneous grouping was accomplished before desegregation began, although there is no explanation at all of the difficulties (R. 115a). It is equally clear from the cross-examination that the problem of obtaining homogeneous grouping of pupils is expected to continue for a long period of time beyond desegregation (R. 124a). There has been no attempt to explain how or why a twelve year period of desegregation helps to achieve homogeneous grouping, or why a shorter period prevents homogeneous grouping, or any other rational connection between the two situations. We have only the witness' conclusion that: "If homogeneous grouping has any value, then we can get the greatest value out of it by a gradual plan" (R. 116a). But he did not testify that homogeneous grouping had value or how race was related to it. Certainly there was no evidence that twelve years was necessary to achieve desegregation with homogeneous grouping.

So far as teacher recruitment was involved there was no testimony at all that twelve years, or any number of years would solve, alleviate, or in any way affect recruitment. In any event, though the record does not at all clearly explain the extent of the problem, insofar as it relates to desegregation it reflects alleged opposition of some teachers to teaching desegregated classes. In this aspect it partakes of the unconstitutionality of respondents' reliance on hostility.

To place respondents' contentions in their most favorable light, we might also take note of the mere mention in the

record that administrative difficulties may also be presented by the new racial transfer plan (R. 37b). This plan, petitioners submit, is clearly unconstitutional. But, here again, there is not so much as a suggestion that any number of years is needed to cope with the problem.

"'The vindication of rights guaranteed by the Constitution can not be conditioned upon the absence of practical difficulties.'" *Aaron* v. *Cooper*, 257 F. 2d 33, 38 (8th Cir. 1958), quoting *Orleans Parish School Board* v. *Bush*, 242 F. 2d 156, 166 (5th Cir. 1957).

Petitioners submit, however, that this Court should, as it always does in constitutional cases, make its own appraisal of the factual basis of the judgment. See *Ohio Valley Water Co.* v. *Ben Avon Borough*, 253 U. S. 287 (1920); *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38, 49 (1936); *Ng Fung Ho* v. *White*, 259 U. S. 276, 284-285 (1922); *Baltimore & Ohio RR Co.* v. *United States*, 298 U. S. 349, 372 (1936); *Norris* v. *Alabama*, 294 U. S. 587, 589-590 (1935); *Watts* v. *Indiana*, 338 U. S. 49, 50-51 (1949); *Niemotko* v. *Maryland*, 340 U. S. 268, 271 (1951); *Pierre* v. *Louisiana*, 306 U. S. 354, 358 (1939); *Feiner* v. *New York*, 340 U. S. 315, 316, 323 footnote 4 (1951); *Spano* v. *U. S.*, —— U. S. ——, 3 L. ed. 2d 1265, 1267 (1959); *Napue* v. *Illinois*, —— U. S. ——, 3 L. ed. 2d 1217, 1222-1223 (1959).

There can be no doubt that without evidence concerning opposition respondents' record would have been reduced to a mere few words concerning administrative problems, none of them supporting protracted delay at all.

Respondents' position apparently is, however, that community hostility to desegregation is relevant and can justify delay in compliance, where that hostility is shown to have an effect on the educational program. This argument seeks support from the obvious fact that administration

of a change-over does take some time; as this Court has recognized, and that administrative problems must, of course, be taken into account. But to seek justification for delay for hostility by citing violently induced administrative factors subverts the constitutional rule. Nevertheless, it is a familiar recurring argument. It has, however, been emphatically rejected by this Court in *Cooper v. Aaron*, 358 U. S. 1, 7, 16. See also the discussion of this point by the court below in that case, *Aaron v. Cooper*, 257 F. 2d 33, 37-38 (8th Cir. 1958) and the other lower court cases mentioned there, which indicate consistent rejection of this argument. *Jackson v. Rawdon*, 235 F. 2d 93, 96 (5th Cir. 1956), cert. den. 352 U. S. 925; *School Board of the City of Charlottesville, Va. v. Allen*, 240 F. 2d 59 (4th Cir. 1956), cert. den. 353 U. S. 910; *Orleans Parish School Board v. Bush*, 242 F. 2d 156, 166 (5th Cir. 1957), cert. den. 354 U. S. 921; *Allen v. County School Board of Prince Edward County, Va.*, 249 F. 2d 462, 465 (4th Cir. 1957), cert. den. 355 U. S. 953. See also *Buchanan v. Warley*, 245 U. S. 60, 81, where this court more than forty years ago rejected the argument unanimously.

The Court has never intimated that the federal courts should take cognizance of problems created by the hostility of anyone (including the public, teachers or school authorities, parents or pupils) to desegregation, whether real or imagined or in whatever manner that hostility may have been manifested. This Court recognized in the *Brown* case that "varied local school problems" existed throughout the several states with laws "requiring or permitting racial discrimination in public education," and concluded that "because of their proximity to local conditions and the possible need for further hearings" the trial courts "can best perform this judicial appraisal." But the decision lends no support for the assumption of the courts below that their

familiarity with the extent of local racial prejudice and community antagonism to public school desegregation can be permitted to influence either the time or manner in which the courts of the United States will require governmental agents to respect the constitutionally protected liberties of citizens. A doctrine recognizing hostility to the enjoyment of constitutional liberties as a basis for postponement or denial of those liberties is entirely alien to the concept of liberty under law. Indeed, there probably hardly is a district which has refused to desegregate where some witnesses would not testify that there is at least some opposition to desegregation and that some tension would result from desegregation. Liberty could not survive such a doctrine.

Assuming *arguendo* that the effect of community antagonism was a permissible consideration, the decision of the court below that the plan was consistent with compliance at the earliest practicable date, was not supported by the record. This Court emphatically stated in *Brown* v. *Board of Education*, *supra*, that "the burden rests upon the defendants to establish that such time is necessary in the public interest and is consistent with good faith *compliance at the earliest practicable date*." (Emphasis supplied.) The proposition was stated in *Cooper* v. *Aaron*, *supra*, in these words:

> "... the courts should scrutinize the program of the school authorities to make sure that they had developed arrangements pointed toward the earliest practicable completion of desegregation, and had taken appropriate steps to put their program into effective operation" (358 U. S. at 7).

Respondents established no basis in the record for the conclusion that a twelve year plan was consistent with compliance at the earliest practicable date whether one

considered community hostility or not. Indeed, as time has gone on respondents have shown less disposition to desegregate than at the outset. Prior to the hearing in the trial court at which the instant plan was considered the court had exhibited substantial patience with respondents and certainly allowed them sufficient time to make administrative adjustments and to conduct a substantial effort to reduce hostility. The court had granted respondents a continuance from March to October, 1956, to prepare a plan (139 F. Supp. 578); had allowed respondents until December 1957 to submit a complete plan after approving the interim plan in January 1957 (R. 65a); and had permitted them until April 1958 to submit a new plan after the December 1957 plan was held unlawful (R. 103a). But the passage of time in this case accompanied an apparent hardening of resistance to desegregation among the respondents themselves. In 1956 defendants agreed to submit a plan (R. 26a-31a). But in 1957 they attempted to secure judicial approval to abandon the initial interim plan before it was commenced (R. 1b-12b). They filed a cross-appeal designed to substitute their plan for three school systems (white, Negro and "integrated") (R. 13b-16b) for the present twelve-year plan. Nowhere have they shown the relationship between slowness in desegregation and hostility.

IV.

The proposed plan contains racial standards for pupil transfer which perpetuate racial discrimination within the school system.

One of the most obvious accommodations to those who disagreed in principle with the *Brown* and *Cooper* cases was the provision for free transfers in order to continue *de facto* segregated schools for an indefinite period. The proposed plan approved by the courts below includes the following provision:

> "B. All provisions of the Plan with respect to zoning, transfers and the like shall continue in force and effect with respect to each additional grade as the Plan becomes applicable to such grade" (R. 236a).

The effect of the provision is to incorporate into the plan paragraphs numbered 2, 3, 4 and 5 of the interim or "initial step" plan (R. 61a-62a) which establish zones without regard to race but explicitly permit transfer out of such zones where a student is zoned for a school previously established for children of another race or where children of another race are in the majority.[5] "This . . . is based

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[5] "2. A plan of school zoning or districting based on location of school buildings and the latest scholastic census without reference to race will be established for the administration of the first grade and of other grades as hereafter desegregated.

"3. Every student entering the first grade will be permitted to attend the school designated for the zone in which he or she resides, subject to regulations that may be necessary in particular instances.

"4. Applications for transfer of first grade students from the school of their zone to another school will be given careful consideration and will be granted when made in writing by parents or guardians or those acting in the position of parents, when good cause therefor is shown and when transfer is practicable, consistent with sound school administration.

wholly upon color, simply that, and nothing more." *Buchanan* v. *Warley*, 245 U. S. 60, 73.

Petitioners makes no objection to the provisions of paragraphs 2, 3 and 4 if they are fairly administered without regard to race. Petitioners do object to paragraph 5 which prescribes racial standards for the administration of paragraph 4.

The provisions of paragraph 5, explicitly classify pupils according to their race in providing standards for the school authorities to grant transfers out of the established zones. Moreover, their chief vice, in the context of this suit, is that they tend to perpetuate, not eliminate, segregation.

All governmental classifications based on race or color are presumptively arbitrary. *Brown* v. *Board of Education*, 347 U. S. 483, and *Bolling* v. *Sharpe*, 347 U. S. 497; *Korematsu* v. *United States*, 323 U. S. 214, 216; *Hirabayashi* v. *United States*, 320 U. S. 81, 100; *Nixon* v. *Herndon*, 273 U. S. 536, 541. The racial classification made in the instant case, by which a student's right to transfer is made to depend upon a calculation of the race of a "majority" of the students in a school or class within a school and or the racial composition of the school prior to the plan, bears no reasonable relation to any proper governmental or educational objective, and none has been asserted except that it will cater to existing racial antagonisms. Such a provision regulating assignments on the basis of race is plainly

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"5. The following will be regarded as some of the valid conditions to support application for transfer:

(a) When a white student would otherwise be required to attend a school previously serving colored students only.

(b) When a colored student would otherwise be required to attend a school previously serving white students only.

(c) When a student would otherwise be required to attend a school where the majority of students in that school or in his or her grade are of a different race.

inappropriate in a plan purporting to end racial segregation, for an adequate plan should be framed so as to "suppress the unlawful practices and to take such reasonable measures as would preclude their revival", cf. *United States* v. *Crescent Amusement Co.*, 323 U. S. 173, 188, citing *Ethyl Gasoline Corp.* v. *United States*, 309 U. S. 436, 461, and not permit the perpetuation of the unlawful condition previously created by the state.

The assertion that any resulting discrimination from the racial classification is the product of "private" rather than state action is without substance, for here it is clearly the school authorities who assign pupils, and it is the school authorities who continue to brand Negroes as an inferior group to be set apart. See *McLaurin* v. *Oklahoma State Regents*, 339 U. S. 637, 641. The proposition that no citizen has a liberty to "demand action by the state which results in the denial of equal protection of the laws to other individuals" was applied in *Shelley* v. *Kraemer*, 334 U. S. 1, 22, and *Barrows* v. *Jackson*, 346 U. S. 249, 260. If school authorities may not assign pupils on the basis of race at the command of a state legislative enactment, it is unthinkable that they may do so in obedience to the prejudices of individual parents or pupils.

That this provision has operated in the instant case to preserve the *status quo* of segregation to a large extent is already apparent. Because of the racial residential patterns in the community, when the first grade was desegregated in Nashville in 1957, only 115 of 1400 Negro first graders were eligible to attend schools previously attended by white students (R. 86a-87a), and only 55 of 2000 white first grade students were eligible to attend schools previously attended by Negro students (R. 82a). Under the racial transfer provision all 55 white students and 105 of the 115 Negro students transferred out of their zone

(R. 83a). Some of the 105 Negro pupils later sought re-transfer back to their zones but were denied this opportunity (R. 84a-86a).

Thus the transfer standards, indicating as they do the school authorities' expectation of and acquiescence in the preservation of a large degree of segregation by community pressures,[6] operate as they were intended. Here we have a plan based upon "the interplay of governmental and private action" working to accomplish segregation. Cf. *N. A. A. C. P.* v. *Alabama*, 357 U. S. 449, 463. The record clearly reveals the activities of forces using unlawful methods to prevent Negroes from asserting their rights to the equal educational opportunities which have been long denied them. The respondents' racial transfer standards provide an effective governmental framework within which these forces may effectuate their purposes.

The fact that some Negroes may elect not to assert their rights and may make use of the "racial transfer provisions," cannot justify the denial to petitioners of the right to attend school in a public school system which makes no regulations on the basis of race, and which deals with all pupils without regard to their race or color. "It is the individual . . . who is entitled to the equal protection of the laws,—not merely a group of individuals, or a body of persons according to their numbers." *Mitchell* v. *United States*, 313 U. S. 80, 97; *Missouri ex rel. Gaines* v. *Canada*, 305 U. S. 337, 350-351.

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[6] Note the opinion of the Court below, appendix page 75:

"It is conceivable that the parent may have made the choice from a variety of reasons—concern that his child might otherwise not be treated in a kindly way; personal fear of some kind of economic reprisal; or a feeling that the child's life will be more harmonious with members of his own race."

V.

The issues presented herein are of such high importance as to require review by this Court.

This case presents important questions relating to the enforcement or administration of the directions given by this Court to lower courts in *Brown* v. *Board of Education*, 349 U. S. 294. The substantial volume of litigation presenting divergent applications of those directions makes it clear that here is a question ripe for examination and that a clarification is imperative. A significant number of cases involving related questions are pending in federal trial or appellate courts; a clarifying decision will have immediate importance far beyond the facts and parties in the case at bar.

Over four years have passed since the directions of the *Brown* case were formulated. During this period federal courts have construed and applied them to sanction a variety of gradual desegregation programs or plans. For example, a three-step three year plan was approved in *Groves* v. *Board of Education of St. Mary's County, Md.*, 164 F. Supp. 621 (D. Md. 1958), affirmed *Board of Education of St. Mary's County* v. *Groves*, 261 F. 2d 527 (4th Cir. 1958); a three-step six year plan was approved for Little Rock, *Aaron* v. *Cooper*, 143 F. Supp. 855 (E. D. Ark. 1956), affirmed 243 F. 2d 361 (8th Cir. 1957); a two-step seven year program in *Moore* v. *Board of Education of Harford County, Md.*, 152 F. Supp. 114 (D. Md. 1957), affirmed *sub nom. Slade* v. *Board of Education of Harford County*, 252 F. 2d 291 (4th Cir. 1958), cert. denied 257 U. S. 906; and a nine-step nine year plan in *Banks* v. *Izzard*, Civ. No.

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[1] But see *Garnett* v. *Oakley*, Civ. No. 167, W. D. Ky., April 17, 1957; *Shedd* v. *Board of Education of Logan County*, Civ. No. 833, S. D. W. Va., April 11, 1956 (rejecting three-step three year proposals despite local outbreaks of violence and alleged but, as in the instant case, vaguely defined administrative problems).

1236, W. D. Ark., September 1957.[8] Now, for the first time,[9] a twelve-step twelve year or one-grade-a-year stair-step plan has been sanctioned for Nashville.[10]

The question of the twelve year stair-step plan's compatibility with the law of *Brown* is pending in a number of cases. See *Evans* v. *Buchanan*, 172 F. Supp. 508 (D. Del. 1959), appeal pending before the United States Court of Appeals for the Third Circuit; *Bush* v. *Orleans Parish School Board*, Civ. No. 3630, E. D. La., July 15, 1959 (order "suggested" that the school authorities "consider" a twelve-year stair-step plan). Cf. *Ross* v. *Petersen*, Civ. No. 10444, S. D. Tex., undecided, *Robinson* v. *Evans*, Civ. No. 2643, S. D. Tex., undecided (Houston and Galveston school authorities respectively, have submitted proposals for stair-step plans without time limits).

If the decision below is permitted to stand by this Court, that decision will constitute a guiding precedent to other

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[8] But see *Willis* v. *Walker*, 136 F. Supp. 177, 136 F. Supp. 181 (W. D. Ky., 1955) (rejecting a two year delay); *Grimes* v. *Smith*, Civ. No. 167, E. D. Ky., February 18, 1958; *Mitchell* v. *Pollack*, Civ. No. 708, W. D. Ky., February 8, 1957 (rejecting four-step four year plans).

[9] Prior decisions "clearly indicated that a 12-year plan was not compliance with the law." *Mitchell* v. *Pollack*, Civ. No. 708, W. D. Ky., February 8, 1957; *Pierce* v. *Cabel County*, S. D. W. Va., September 12, 1956. In other words, the District Courts did "not feel that the 12-year plan is moving with all deliberate speed which under the law we are required to do." *Mitchell* v. *Pollack*, *supra*, September 27, 1956.

[10] Desegregation has been effectuated successfully in shorter periods of time in other border urban and cultural centers: Louisville, Kansas City, St. Louis, Baltimore, Wilmington and the District of Columbia. Significantly, the school authorities in those cities rejected protracted plans as being inconsistent with sound administration. See, e.g., Carmichael and James, The Louisville Story 83 (1957), where Louisville's Superintendent stated: "Desegregating a grade at a time or several grades at a time obviously would increase social confusion by having some children in a single family attend mixed schools while others remained at segregated schools. Administrative difficulties, too, obviously would be compounded with any partial program." Cf. Brief for Appellants, etc. on Further Reargument, pp. 17, 20-21, *Brown* v. *Board of Education*, 349 U. S. 294.

federal courts. Yet, the decision below is based almost entirely on patently erroneous consideration of factors which the *Brown* and *Cooper* decisions have excluded from consideration. This Court should, it is respectfully submitted, grant *certiorari* and after hearing, vacate the judgment below with orders that the inferior courts reconsider the record only in the light of constitutionally permissible factors. Such reconsideration should, of course, make provision for the fact that those who brought suit herein are entitled to relief in the form of desegregated education for themselves. Only in this way can the constitutional requirement of nonsegregated education—"so fundamental and pervasive that it is embraced in the concept of due process of law," *Cooper* v. *Aaron*, 358 U. S. 1, 19—become a reality. Otherwise, in the guise of paying lip service to the need for considering administrative factors, hostility will in reality assume sway, and the crucial constitutional rights here involved will become essentially unrealizable.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

Opinion

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

Nos. 13,748, 13,749

ROBERT W. KELLEY, *et al.*,

Appellants and Cross-Appellees,

—v.—

BOARD OF EDUCATION OF THE CITY OF NASHVILLE, DAVIDSON COUNTY, TENNESSEE, *et al.*,

Appellees and Cross-Appellants.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION

Decided June 17, 1959.

Before ALLEN and MCALLISTER, Circuit Judges, and CHOATE, District Judge.

MCALLISTER, Circuit Judge: This is an appeal from the judgment of the district court approving a plan of the Board of Education of the City of Nashville, Tennessee, providing for desegregation of the public schools of that city, commencing with the first grade, and proceeding by the desegregation of one additional grade a year until all grades in all public schools have been finally desegregated.

The background of the case is pertinent: The entry of the judgment approving the above plan of desegregating the first grade and compliance therewith by the Board of Education and the school authorities gave rise to violence

on the part of criminal elements opposed to desegregation, who wrecked a city school by bombing, and destroyed a synagogue by the same means. Unlawful crowds of disorderly persons caused great trouble and turbulence until the district court restrained one Kasper and others, by injunction, from acts of violence, intimidation, coercion, and incitement. In granting the injunction, the district court declared that the action of the Board of Education in putting into effect the order and judgment of the court "precipitated a situation in the City of Nashville which very nearly approached for some several hours' time—if not for several days' time—a reign of terror, certainly a reign of terror among those parents having children in the public schools, particularly in the first grade schools. * * * [If] it had not been for the decisive way that the City authorities went about discharging their duties, the reign of terror which overwhelmed the City would have been much worse than it actually was." It was the Board of Education of the City of Nashville that, when the trouble started, immediately pressed for the injunction against the acts of violence and coercion; and it was the police of the City of Nashville that curbed the acts of intimidation and enforced public order. It is to be remarked that none of the illegal acts, riotous conduct, or inflammatory propaganda hampered either the district judge or the Board of Education in carrying out their duties, firmly and swiftly, in the face of terroristic threats and disorder that characterize such unlawful groups in every part of the country where riots, arising from any cause, have, in the past, occurred.

Plaintiff-appellants are Negro children who attend public schools in Nashville, Tennessee, and their parents. On September 23, 1955, on behalf of themselves and others in like position, they filed their complaint in the district court against defendant-appellees, the Board of Education of the City of Nashville, and its members, the Superintendent

of Schools for Nashville, and several public school principals. In their complaint, appellants asked for a judgment declaring that the laws of Tennessee, requiring segregation of white and Negro children in the schools, were unconstitutional; and they prayed for an injunction restraining appellees from refusing to admit such Negro children to specified schools, solely because of their race. The complaint was subsequently amended to add, as party plaintiffs, two white children (and their parents) who had been denied admission to schools theretofore operated on a segregated basis for Negroes.

To this complaint, appellees filed answer, admitting that they had denied appellant school children admission to the public schools closest to their homes, to which they had applied, solely on the basis of race; but appellees conceded that the segregation laws of Tennessee must, necessarily, yield to the principles declared by the Supreme Court in the so-called School Segregation Cases. Appellees, accordingly, set forth that they intended in good faith to implement the decisions of the Supreme Court; that an Instruction Committee had been appointed by the Board of Education for the purpose of studying the situation; that two comprehensive surveys had been carried out, and two progress reports filed; and that appellees needed more time to formulate a plan for desegregation in the public schools.

Because of the nature of the relief sought in the complaint, asking that the laws of Tennessee requiring school segregation be declared unconstitutional, the case came on for hearing before a three-judge court.

On the hearing before the three-judge court, it appeared that the Board of Education of the City of Nashville had proceeded to investigate and take action after the decision of the Supreme Court in *Brown* v. *Board of Education*, 349 U. S. 294, which had enunciated the principles that

should govern the district courts in formulating decrees to implement its ruling that racial segregation in public schools is unconstitutional. Immediately after the determination in the above case, the Board of Education began an extensive study to determine the methods to be followed in the school system of the City of Nashville to effectuate the constitutional principles declared by the Supreme Court. These studies included investigation of the programs of other cities in the matter of desegregation, an analysis and review of pertinent books and periodicals, attendance by its representatives at work shops and other group meetings, and the exchange of views between its members and others invited to meet with its Committee.

From one of several opinions filed by the district court during the course of these proceedings on different aspects of the case, it appeared that, from the outset, the Board of Education frankly and openly recognized its obligation to maintain the school system upon a racial non-discriminatory basis, and that it had endeavored, by its careful investigation and study of the question, to find a solution which would accomplish the transition as soon as reasonably practicable consistent with the public interest and the efficient operation of the schools. As the court remarked; "The problem confronting the Board of Education was not one which was concerned with a single school but with an entire school system which had been maintained for practically a hundred years always on a segregated basis, and having an aggregate school population of 27,000 students, of whom 10,000 were Negro students. In this situation the Board concluded that it would need more time to formulate a workable plan of integration."

Such was the aspect of the case before the three-judge court on the complaint for a judgment to declare the Tennessee laws requiring segregation of school children to be

in violation of the Federal Constitution. In view, however, of appellees' concessions that the above mentioned Tennessee segregation laws were unconstitutional, and in recognition of their request for further time to formulate a plan of desegregation, a continuance was granted, and, after remanding the case to the district court, an order was entered dissolving the three-judge court.

At the October, 1956, term of the district court, the case was called. Apparently there had been widespread discussion about new laws that might be adopted by the state legislature, and, accordingly, appellees moved for a postponement on the assumption that the 1957 Tennessee legislature might enact statutes relevant to the case. The district court, however, denied such motion for a postponement.

On November 13, 1956, appellees submitted to the district court a plan embodying the following provisions: abolition of compulsory segregation in Grade One of the elementary schools beginning September, 1957; the establishment of a zoning system for Grade One, based on residence, and without reference to race; the establishment of a transfer system allowing the transfer of white and Negro students who would otherwise be required to attend schools previously serving only members of the other race, and allowing the transfer of any student from a school where the majority of the students were of a different race; fixing December 31, 1957, as the date for a further recommendation by the Board of Education's Instruction Committee as to the time and number of grades to be included in the next step to abolish segregation.

After a hearing, the district court held that the plan presented by appellees was inadequate, inasmuch as it did not submit a complete plan to abolish segregation in the public schools; and the Board of Education was, therefore, required to present, by December 31, 1957, a report

setting forth a plan to abolish segregation in the remaining grades of the city school system, including a time schedule. The district court retained jurisdiction of the case and withheld the issuance of the injunction prayed for in the complaint, pending the filing of the new plan.

On January 9, 1957, the Governor of Tennessee appeared before a joint session of the General Assembly to propose five bills permitting local authorities to act with respect to questions of racial integration in the public schools.

On January 25, 1957, the bills proposed by the Governor were finally approved by the General Assembly, and, as enacted, included: (1) legislation authorizing the establishment of separate schools for pupils whose parents or guardians voluntarily elected that they attend schools only with members of their own race, generally referred to as the School Preference Law; (2) a Pupil Assignment Act to provide for the assignment of pupils to public schools by county or city boards of education; (3) an amendment to the then existing law, authorizing the transfer of pupils between school systems; (4) authorization for the joint operation of school facilities; and (5) an amendatory bill dealing with transportation of pupils.

On August 30, 1957, the Board of Education filed a motion for leave to file a supplemental answer and counter-claim, alleging that Chapter 11, Public Acts of Tennessee for 1957, authorized the establishment of separate schools for white and Negro children whose parents elect that such children attend schools with members of their own race; and, that petitions had been received from parents urging the establishment of such separate schools, and seeking a declaration of its right to operate separate schools in the light of the prior judgment of the court. After the hearing of arguments on appellees' motion to file a supplemental answer and counter-claim, the district

court ruled that the state statute in question was unconstitutional and denied the motion of the Board of Education to file its supplemental answer and counter-claim.

On December 6, 1957, the Board of Education filed with the district court what was termed a complete plan to abolish segregation in all grades of the city school system, which contemplated the establishment of a system substantially the same as that authorized by the provision of the state statute which the district court had previously ruled was unconstitutional. By the terms of this plan, an annual census was to be conducted to determine which parents desired their children to attend schools with members of their own race exclusively, and which parents desired that their children attend schools with members of another race. On the basis of this poll, three types of schools were to be operated: schools for Negro children whose parents preferred that their children attend segregated schools; schools for white students whose parents preferred that their children attend segregated schools; and schools for students whose parents preferred that they attend integrated schools.

On January 20, 1958, the Board of Education filed a motion to dismiss the case on the ground that the Tennessee Pupil Assignment Act, Chapter 13, Public Acts of 1957, which was approved a year earlier, provided an adequate administrative remedy which must be exhausted before the rights of appellants to transfer to different schools could be judicially determined. After a hearing in open court on January 28, 1958, the district court, on February 18, 1958, denied the motion to dismiss, stating that the Board of Education was committed to a policy of continuance of compulsory segregation, and that the remedy provided by the Pupil Assignment Act was not adequate. The court further disapproved the plan of the Board of Education filed on December 6, 1957, holding

that, like Chapter 11, it failed to meet the test of constitutionality because it would give the sanction of law to a continuation of compulsory segregation in public education. The district court, however, continued to withhold the issuance of an injunction and allowed the Board additional time until April 7, 1958, to file another plan to eliminate racial discrimination in its school system.

On April 7, 1958, the Board of Education filed with the district court a plan for the abolition of compulsory segregation in Grade Two in September, 1958, and in one additional grade a year thereafter, until segregation had been entirely abolished in all primary, secondary, junior high school, and senior high school grades, retaining the zoning and transfer provisions contained in the plan, as theretofore approved by the court.

After a hearing, the district court, on June 19, 1958, filed an opinion approving the Board's plan. On July 17, 1958, findings of fact and conclusions of law were entered by the district court, in accordance with its opinion, and a judgment was entered in which the final plan of the Board of Education was approved in its entirety and appellants' prayer for injunctive relief was denied. The district court furthermore retained jurisdiction of the case during the entire period of transition.

It is contended by appellants that the district court erred in its judgment in that the plan for desegregation of all the grades of all of the public schools of Nashville, as approved by the district court, violates the Constitution, as declared by the Supreme Court, for the following reasons:

> (a) That the plan of the Board of Education, instead of providing for immediate desegregation of all grades of all public schools—which it is claimed by appellants is required by law—extended over too long a period, and did not comply with the direction of the

Supreme Court that a district court require a prompt and reasonable start toward integration, and that it take such action as is necessary to bring about the end of segregation in the public schools with all deliberate speed.

(b) That the plan permitting every student, within its provisions, to attend the school designated for the geographic zone of his residence, and, at the same time, permitting the parents of such student to apply for his transfer, where he is one of a racial minority in his zone—or would be required by the zoning to attend a school which previously served only students of the other race—is a deprivation of such child's constitutional rights.

On the other hand, it is contended by the Board of Education and the other appellees and cross-appellants, that the district court erred in holding that the Fourteenth Amendment was violated by a plan based on a statute of the State of Tennessee, enacted after this controversy arose, in which local school boards were authorized to provide separate segregated schools for both white and Negro children whose parents voluntarily elected that their children attend such segregated schools with members of their own race.

Full implementation of the constitutional principles involved in this case "require[s] solution of varied local school problems. School authorities have the primary responsibility for elucidating, assessing, and solving these problems * * *." *Brown* v. *Board of Education*, 349 U. S. 294, 299. Therefore, a consideration of the school problems confronted by the Board of Education of the City of Nashville, and the solution arrived at by the Board, is necessary to a determination of the controversy before us.

As above mentioned, at the time of the hearing in the district court, the aggregate public school population of Nashville was 27,000 students, of whom 10,000 were Negro students. There were 38 primary and elementary schools, and 8 senior high schools. Thirteen of the primary and elementary schools are operated for Negro students. Two of the eight senior high schools are operated for Negro students. The Nashville schools employ 1057 principals and teachers, of whom 702 are white teachers, and 355 are Negro teachers. First grade teachers number 115, of whom 73 are white, and 42 are Negro teachers. There is no difference in the salary schedules of Negro teachers and white teachers; and, insofar as physical facilities are concerned, the public schools of Nashville operated for Negro students are substantially equal to those operated for white students.

If an order for total desegregation were entered by the court, every one of the public schools in the city would be affected, although, as to some of the schools, there would probably be one Negro child—or only a few Negro children—in such school zone; and as to others, the same situation applies with regard to white children. The enrollment of all students in Grade One is 12% of the entire school population of Nashville and consists of approximately 3,400 students, of whom 1,400 are Negroes—a ratio of more than 41% of Negro students in the first grade. Here, however, comes into play a factor that complicates the desegregation of schools—residential segregation, one facet of the problem that, like school segregation and other discrimination, results in what might be termed economic segregation, a virtual denial of equal opportunity of work, employment, living conditions, advancement, and income, existing in varying degrees, in every state of the union. In the instant case, because of residential segregation, only 115 of the 1,400 Negro students in the first

grade were eligible to attend schools previously attended only by white students, under the zoning system based on residence; and only 55 of the 2,000 white students in the first grade were eligible to attend schools previously attended only by Negro students. All 55 of the white students were, through their parents, granted transfers to white schools, and 105 of the 115 Negro students were, through their parents, granted transfers to Negro schools. In cities having a large Negro population, Negroes usually live, as a group, in certain areas, largely because of the fact that residential restrictions, in the way of restrictive covenants running with the land, have, for many years, made it impossible for them to live elsewhere, and, as a result, especially in cities of the North, they have been confined to rundown residential areas with the poorest accommodations, at high rents. This case is not concerned with that problem, however, but reference is made to the fact as indicating the reason why schools in certain areas are attended wholly by Negro children, both in states where, heretofore, segregation has been sanctioned by state law, as well as in states where, theoretically, segregation has been condemned.

Based on the zones established by the Board of Education, then, there would probably, at the present time, be Negro children in every school in Nashville, although when the zones were first established, there were, perhaps, ten chool zones that did not have a single Negro child in them. The intervening change is due to the continually shifting population. After the order of desegregation in the instant case, there were six of the elementary schools that had both white and Negro children. One of such schools had one Negro child, but on the first day of integration, that school was bombed and destroyed by criminal elements, leaving five schools with children of both races. However, as above suggested, if the parents of

Negro students had not asked for the transfer of their children to schools in which the predominant number of students was Negro, there would have been several more schools with students of both races.

After the Board of Education had desegregated Grade One, and the district court had required that a plan for future desegregation in the other grades be submitted, the Board sought the recommendations of the school principals, and, with this objective, the Superintendent of Schools of the City of Nashville called together all of the principals of the 38 elementary schools, announcing to them the necessity of submitting a plan for desegregating the remaining eleven grades. He commenced by stating that he had great respect for their judgment; that they were close to the entire matter; that they were interested in the children; and that he would like to have their suggestions as to the best plan to be adopted.

The principals appointed a committee of themselves to draw up a questionnaire, which all principals were invited to answer, without disclosing their names. The questionnaires were, accordingly, answered by the principals, and thereafter submitted to the Superintendent of Schools. In these replies to the questionnaires, one principal advocated immediate desegregation of all grades in all schools. Thirty-seven principals advocated a gradual plan, or a year-by-year plan. The plan determined upon, after Grade One was desegregated, was to desegregate a grade a year, commencing with the second grade and continuing year by year until the entire twelve grades had been desegregated. This plan was the one which the Superintendent of Schools subsequently agreed was the best plan, and was the one adopted by the Board of Education, which was submitted to the district court and approved by it.

The reasons why the school authorities supported this plan and considered it the best, under the circumstances,

are pertinent to the determination of the issues before us, inasmuch as the solution of such school problems is the primary responsibility of the local school authorities. *Brown* v. *Board of Education*, *supra*.

In his testimony as to the reasons why he favored the grade-by-grade plan of desegregation, the Superintendent of Schools declared, preliminary to an exposition of his views, 'that the school authorities had considerable difficulty, which was accompanied by confusion and disorder, when the plan was put into effect, in spite of the fact that they did everything they could to avoid it; that advance registrations were held "so that when the little first-graders registered, there wouldn't be any upper classmen or their parents there. We arranged so that the little Negro children and their parents would not have to go to a school where the majority of the folk were white, to get their transfers. We made the same arrangement with regard to the white children who had to get transfers. We did everything we knew to do, and in spite of everything we could do, we lost about $70,000 worth of the Hattie Cotton building [through bombing], and a great many little children whose first experience in school should have been one of security and harmony and joy found themselves faced with a situation where they were subjected to dread and fright and, in many cases, actual danger. I think that the effect of that sort of thing on a child is something that should be avoided * * * and I think the year-by-year plan * * * will involve less of this damage to the children than any other plan we could propose. * * * Segregation by race in the public schools of Nashville (right or wrong) is a practice of long standing, and to change it goes counter to the feelings of a great many people. There are a lot of adjustments to be made on the part of the Negro children (it's something they're not accustomed to), on the part of the white children (it's

something they're not accustomed to), on the part of the parents, and on the part of teachers. It's something none of us are accustomed to. It involves more difficulty in adjustment than someone just looking on from the sidelines would recognize or realize, and I firmly believe that this adjustment can be made with less friction, it can be made with less disadvantage to everybody concerned, it can be made more smoothly, it can be made with less difficulty, psychologically, educationally, socially, and otherwise if it is done slowly. This plan, of course, proposes that it be done slowly. * * * I assume that the white race wants to remain a white race and the Negro race wants to remain a Negro race as far as race is concerned. The two races live together and work together in the same city and the same community. It's very important that there be between the two races and between individuals representing the two races a relationship of friendliness, cooperation, and respect such as I think we have had in the past to a large degree and which I think has improved a great deal during the past twenty or thirty years."

Another reason why the Superintendent favored the plan was that it provided for a more homogeneous grouping of students. He stated that in such a homogeneous grouping, consideration was given to several factors, other than race. "In fact, I wouldn't consider that as the principal factor that I had in mind." Rather, he said, it was a matter of background, of aptitudes, of achievement. The matter of homogeneous grouping was something that they had been dealing with in Nashville for a long time before the matter of desegregation arose, and would always continue to be a problem. But the Superintendent felt that the plan of desegregation approved by the district court would make for a more homogeneous grouping of students, which educators felt was a wise thing to achieve. He stated that they could not always have students of just the

same aptitude, the same social background, the same chronological age, and the same achievement level; but that they would be further from having such homogeneity if there were quick desegregation. The principal person, he declared, whose welfare is to be considered in the matter of homogeneous grouping, is the student. If desegregation occurred immediately, he went on, there would be a situation where a group of students, or individual students, would be competing with others at a disadvantage, and a number of students would have to be held back because of others who were not on the same achievement plane with them.

The Acting Chairman of the School Board of the City of Nashville also testified as to the plan approved by the district court, and outlined various plans considered by the Board, and the reasons favoring the grade-by-grade plan. He stated that the Board invited various groups to appear before it; that there were also extremists of both sides who presented their views; that organizations sponsored by groups outside Nashville gave advice and, as experts, sought to give professional and expert assistance; that they were far apart in their views; and that the main concern of the Board was that "the children" whom "everybody had been forgetting, were the ones to be educated, and also we are concerned about obeying the laws of the land." He told about the difficulties encountered when the first grade was desegregated; of the disorders at the schools when every police officer on the force was called into service, "and it was still pretty rough." The Chairman had a son who was starting in the first grade. He stated: "I went through the crowd to take my child to school, and if I hadn't been on the Board, he wouldn't have gone back the next day, because it wasn't the right condition for a child to go to school. * * * The next day there wasn't anybody there but about one or two boys, mine, and another

boy, and a little colored boy. That's just about all they had the re of the week, so I did not see any use in staying there. * * * They got up as high as fifteen or twenty during the [next] week." The Chairman felt that with the year-by-year plan, the opposition would be less each year the plan proceeded. He stated that, while the main trouble in desegregation came from outside the school, nevertheless there was tension affecting the teachers; but that in spite of the opposition of certain white parents, the teachers were able to handle the situation. It was, he said, a new experience for the teacher. She did not want the white parents "jumping on her neck," and she didn't want to hurt the little colored boy in the class; but the size of the problem had been such that the teachers had been able to handle it. He felt that the plan, starting with the first grade, and continuing each year up another grade, would be successful. The Negro and white children would already be a part of the class when it went into the higher grade. They would keep their achievement level as they went through their school years; they would have gone through the same educational experiences, from the first grade up to the twelfth grade, year by year. For these reasons, the Chairman felt that the year-by-year plan was the best that could be devised. He stated that consideration had been given to a plan to desegregate first the twelfth grade, then the eleventh, and so down, but the Superintendent had expressed the opinion that such a plan was educationally unsound; and the Board felt that, because of the transfer provisions of the plan, there would be no desegregation whatever in those grades, and that such a plan "would be trying to get around the court order, and we were not trying to do that. We were trying to abide by the court ruling, and not try to get around it. So we switched ends then and started to try to work out the best we could from an educational standpoint."

Another witness for appellees was Miss Mary Brent, a teacher in the Nashville schools for twenty-four years, and a principal for nineteen years. She told of the first two Negro children in the first grade of the Glenn School, of which she is principal, and of her views in support of the year-by-year plan of desegregation. The educational progress of one of the Negro children, during her first year with white children, had been exceptionally good. For the other, the work had been hard because she was one of the youngest in the age group in the first grade. They both made satisfactory progress, however, and as far as the aptitudes of the two Negro students were concerned, there was no difference as compared to the white students. The witness was the principal on duty when disturbances and violence occurred at the beginning of desegregation; and since that time up to the hearing in the district court, tension, she said, had continued to exist. The two Negro children were brought to school each day, and afterward, taken home by one of the parents. They were well accepted by the white children in the first grade. Small children, she stated, have no racial prejudice; but this was not true of older children in the fourth or fifth grades, at the time the first grade was desegregated, when some prejudice was manifested by older students, and trouble occurred. The teachers during the first six weeks were subjected to criticism and arguments from parents coming to the school, and later on, by abusive and vulgar anonymous telephone calls. However, Miss Brent, speaking as a principal, felt that the year-by-year plan was the only one they could accept and make work in Nashville "right now." "If people," she declared, "had been at Glenn School as I was during the last of August and most all of September last year in 1957, they would realize that it was not an easy thing to do. Any radical change is bound to bring chaos, and this was certainly a radical change."

"Now, in an educational institution," Miss Brent testified, "teachers cannot do their best in the midst of excitement and turmoil and upheaval. I feel that if we can do this and get it over in people's minds that it is the law of the land, that we are trying to do our best to accomplish the purpose that the Supreme Court—the thing that the Supreme Court has set up for us to do, if we do it gradually, let them get accustomed to it gradually, I believe we will have a much better chance of succeeding in the end."

Miss Brent further observed, in her testimony: "To me, integration and desegregation are not the same thing, and we would like very much at the end of 11 years, or however many years it takes, to feel that the schools are truly integrated, that it's not just a question of their being desegregated. That feeling will have to come from the hearts of people. It cannot be forced, and it certainly cannot be thrust upon them in a hurry. In the second place, I feel that little children, for instance, these children in the first grade, now are absolutely accustomed to having the Negro and the white child right there together. They play together. They eat together. Everything goes along just the same. There's no difference whatsoever made. Well, if that group moves on next year to the second grade, they will still be accustomed to that. The children that are coming in in the first grade naturally expect their group to be desegregated. If you jump and begin to take children in higher grades, you are going to double your trouble. I firmly believe that it is the only plan. * * * We firmly believe now that they have a foundation that will prepare them to go along into the second grade with the white children. They will the next year be able to progress. There will be no differences in their (shall we say) background. We feel that educationally it will be the best thing for the child, and, after all, that is what we are concerned with. We leave the outside trouble to the policemen."

W. A. Bass, Superintendent of Schools of Nashville, when this suit began, testified as to the reasons that impelled him to support the year-by-year plan, and further discussed the difficulties in securing teacher cooperation, as well as questions of teacher recruitment, and achievement levels of the students.

As reasons for supporting the Board's plan, Mr. Bass said: "I think I have two reasons I should like to state: Number one is the—is the distinct recognition of the fact that the children grow from what they are to what they subsequently become. They don't become what they do become, immediately and at once. And so I based my recommendation on that fact, that adjustment to an entirely new community problem, such as is involved in the change of attitude, the change of practice, the change in tradition that this or that plan of desegregation involves—I reached the conclusion that basing any decision upon the natural growth and development of children would be the only safe and sound approach to the problem.

"Another problem: Schools are not—not just school buildings and just school children. They have teachers there. I took into account the teacher problem and experience I had had with teachers.

"When I came to Nashville as Superintendent of Schools (and this fact can be established in the mouths of many witnesses), I called a meeting of the English teachers in the junior- and senior-high-school groups. It had never occurred to me that I would have any difficulty because as State Supervisor of High Schools I had held conferences all over the state involving both white and Negro teachers primarily in the county schools.

"Well, the day came for the meeting I had personally called. I was in my office gathering up some material I was taking to the meeting. At that time, our Negro schools were opened ten minutes earlier than the white, and as a

consequence they dismissed ten minutes earlier. Our Negro teachers arrived on the scene ten minutes ahead of the white teachers. They went in the room and in a normal manner took their seats in the room.

"Just before I started from my office down to the meeting place, the Principal came down all excited. He said: 'The white teachers won't go in. The Negro teachers have taken their places about over the room, and they won't go in and sit by them.' That was the coldest, most unsatisfactory educational meeting I ever presided over. * * * And so I had to change my tactics, and I started with the principals and supervisors. We had mixed meetings and we finally got common understanding, but it took 10 years to get that done where the teachers and principals and supervisors would sit down and talk in confidence. * * * The question, it seems to me, is one of law, what is the best way to comply with the law of the United States as expressed through the Supreme Court. And—I'm in favor of the Board of Education carrying it out. I know what it is. I have read it over and over, every word of it, and I gave considerable thought to that question of 'all deliberate speed.' Now, we deliberated (and I think we were entitled under the Supreme Court's decision to be deliberate) about this matter. We are not just trying to stand in the way. We are trying to determine the scope that we can take and do the job effectively. * * * I have tried as the Superintendent of the schools, through the principals and teachers at my disposal, to teach people to respect the law, and that I maintain today. * * * This business of teaching and working through teachers is not just a legal matter. It's a spiritual matter at base, and unless we can develop that rapport which a teaching group must have to touch the lives of children, we are not a successful school system, however good our buildings may be or whatever other physical features we may have. * * * I think the

teachers can't absorb too big a piece of this problem at one time, and I think the community will gradually see that their first impressions were erroneous and that this problem can be handled systematically with mutual benefit." The witness further testified: "In this community, consisting of the County and City Schools, we need this year three hundred new teachers. It is a problem to get elementary school teachers. It's my job as Superintendent of Schools to interview all applicants for teaching positions in the Nashville Schools. As School Superintendent and as interviewer for the Board, I have discovered that many teachers who might offer their services as teachers decline to teach in a desegregated school system. Now, it's difficult without this problem being raised. It will be more difficult otherwise. The Board knows that. That's what I have reference to by teacher recruitment." He referred to a difference in the achievement level of pupils in the same grade and stated that, on the basis of evidence—test results—the teachers know that, in the field of arithmetic, for example, in the eighth grade, the level of achievement of the white children is two and a half years above that of the Negro children, and that that constituted a teaching problem. He stated that the schools' psychological testing service in 1954-55 released its publication showing that fact, and other facts relating to it: that the difference in the achievement level of the Negro and white students varied in certain subjects, but showed, in the sixth grade, a difference of about two years and some months, and a difference in the achievement level, in the fourth grade, of about one year.

With regard to the foregoing, it is to be noted that Dr. Henry H. Hill, President of George Peabody College for Teachers, a former Superintendent of Schools in Pittsburgh, Pennsylvania, as well as in Lexington, Kentucky, and Walnut Ridge, Arkansas, and Dean of the University

of Kentucky, called as an expert in education on behalf of appellees, stated: "Children vary widely apart in their ability and willingness to learn, and that is not a racial problem; it's just something everybody knows but few people appreciate the fact; that in the fifth grade, for example, there will be a range of reading ability possibly from the second grade to the eighth, certainly from the third to the seventh, in an average unselected fifth grade, whether white or Negro, or white and Negro, as far as I know, the variations would only be a little wider. It depends, of course, on the community.

"I would like to point out in this connection that in desegregation in the North, at least in the areas that I am most familiar with, there are all Negro and all white schools, or substantially so. There are all Negro high schools in Chicago, for example; there are in Detroit; and there are in New York, due as much as anything else, not to the fact of segregation or all Negro or all white compulsory, but to the fact that Public Schools, if they are well located, are located in the middle of the children, where the children live. So, if you have a well located school in Pittsburgh, for example, in the Hill District, which is largely Negro, you would naturally expect to find a considerable number, mostly Negroes, in that school even though you have no legal segregation. In other words, I think, and I'm no authority here at all and don't pretend to be an authority anywhere, I think residential movements set the basic pattern."

The plan approved by the district court had been adopted by a vote of all of the members of the Board of Education, with the exception of Mr. Coyness L. Ennix, the sole Negro member, who opposed it on the ground that it unreasonably delayed full desegregation. As indicating one of the complex cross-currents of viewpoint, one of the members of the Board, Mr. O. B. Hofstetter, a witness

called by appellants, and a member of the Roman Catholic Church, which had completely desegregated all of its elementary and high schools in Nashville three years before the judgment of the district court in this case, however, favored and supported the Board's plan of grade-by-grade desegregation, in the public schools.

As stated by the district court, the plan of the Board to desegregate the schools one grade each year was strongly supported by the first four witnesses heretofore mentioned; and the court declared that there could be no doubt that the view of these witnesses, based upon their years of experience in education and upon their intimate knowledge of conditions in Nashville, disclosed a sincere belief that a sudden or abrupt transition to a desegregated basis would engender administrative problems of such complexity and magnitude as to undermine seriously and impair the educational system of the city, and that they supported the plan of the Board of Education primarily because they felt that it offered the best opportunity to bring about full desegregation harmoniously and without serious disruption of the educational program of the city.

Opposed to the views of the witnesses for appellees were Dr. Herman H. Long, Dr. Preston Valien, Mrs. Preston Valien, and Mr. Ennix. There was no question that Dr. Long, Dr. Valien, and Mrs. Valien were experts in the field of education, and particularly with respect to the question of desegregation, and, as mentioned, Mr. Ennix, himself, was a member of the Board of Education. Dr. Long was a graduate of Talladega College in Alabama, received his master's degree from Hartford Seminary Foundation, and his doctorate degree in psychology from the University of Michigan. He had taught in Miles College, where he was Dean of Instruction. At the time he testified, he was associated with the Department of Race Relations at Fisk University, in Nashville. Although he

had no direct experience as a teacher with the problem of desegregation, he had, nevertheless, assisted in surveys relating generally to practices affecting the status of minority groups in the fields of education, housing, employment, social welfare services, hospital services, and the like. In a survey in connection with education in Baltimore, where he was one of those invited to participate by the Governor's Interracial Commission, and the Mayor's Interracial Commission, the teachers of Baltimore were asked whether they would have any difficulties in teaching Negro and white children in the same class, and about 30 per cent of the teachers replied that they would not be able successfully to carry out such teaching assignments; but the following term, the schools were integrated, and the teachers were able fairly successfully to teach both Negro and white children in the same class. With regard to the Nashville plan, Dr. Long said: "I am afraid that a large number of people tend to believe that a special kind of plan used by a school board to desegregate the schools is the final test of whether or not you will have effective desegregation, and the assumption seems to be that if the plan protracts the process of change over a long period of years (I think this is—is basic to the Nashville proposal) that you will have a smoother plan of operation and you will have less difficulty. I believe that this assumption isn't entirely sound in looking at the experience of other school systems and the experiences I have had generally in the field of race relations for several reasons: One reason is that any proposed change in this field as well as in others takes place within a climate of opinion and a climate of expectation that is created by the kind of policies which a Board of Education or which any other board, whether it is a board of—of an industry, creates in the public mind. I think it has been fairly well shown that when policies enacted by such boards are vacillating poli-

cies (that is, they do not proceed with clear pronunciation of purpose and without qualification) that when the processes of change in the school system are attempted, you get resistance because the public does not expect that the board means what it says in many of these instances."

Dr. Long further testified: "[In the Nashville plan] one of the assumptions is that if you minimize the change, you reduce the resistance. We need to analyze the character of the resistance, and if we look at our experience in Nashville last year, the people who constituted the protesters and the mobs, the people who were arrested and fined, either fined in court or put under injunction in the court, expressed an attitude which was completely unreasoning as to any kind of change. I think the pattern that is expressing itself is one in which any kind of change toward desegregating schools or any other institutions will meet resistance on the part of this element of the population. The merits of whether or not the change is done in 12 years or whether it's done in one year doesn't enter into this kind of resistance effort because it is fairly completely unreasoning and inconsiderate effort. It's not an effort to meet the issues in terms of any kind of statesmanship. * * * You have now out of the nine states—of the 17 states that were originally operating on the basis of segregated schools, you have nine of those states which have begun desegregation. You have over 300,000 or 350,000 Negro children in integrated schools within three years' time. You have a complete—almost complete desegregation of the school systems of West Virginia. All of these instances were where people had the same attitude toward desegregation that I presume we have in Nashville to a more or less degree."

On cross examination, Dr. Long, after stating that he received the *Southern School News* every month, was asked whether he agreed with the statement, in the March,

1958, issue, of Congressman Adam Clayton Powell, when he declared: "I don't believe there should be immediate integration all over the South. But there should be a beginning, a plan, in sensitive areas. Integration should start in kindergartens. In this manner, the problem could be eliminated in 12 years." When counsel asked: "Now I believe you take issue with that viewpoint?", Dr. Long's reply was: "I take issue with the viewpoint as—as—It expresses a general philosophy which—with which I concur. I take issue with protracting school desegregation over a 12-year period. I don't think that it solves—I think I gave the reasons why. I think it's—It's the hard way around the problem rather than the easy way around."

Dr. Preston Valien, a professor at Fisk University in Nashville for twenty years, had, with his wife, engaged in studies of desegregated situations in many places, having served as consultants at the University of Kentucky, with teachers at Louisville and Lexington. They had made studies of Clinton, Tennessee, Little Rock, Arkansas, Cairo, Illinois, and St. Louis, Missouri. He considered that the Nashville plan was not educationally sound; that a whole generation of public-school Negro students, beginning, at that time, with those in the second grade, "would be denied the right to have their constitutional rights determined, under this particular plan"; that the situation was calculated to engender tension when there were families in which some children could not go to the same school; that the teachers would be divided into those opposed to teaching desegregated classes, and those not so opposed; that such a plan usually engendered confusion and tension. Dr. Valien stated that "when a large number of people are involved and intimately concerned with a particular social-change process, the transition is likely to be smoother than when it focuses on a smaller number and leaves a large crowd who act as spectators and not

concerned in the situation." The witness felt that the schools should be desegregated "on the basis of elementary schools one period, high schools in another period, and have the junior high school fitting in there somewhere." He advocated the desegregation of each one of these units at a time.

Mrs. Preston Valien, an assistant professor of sociology, with extensive graduate study, has participated in most of the desegregation research that has been done in recent years, in various cities and states. She considered that all experience indicates that where desegregation was done year by year, it merely led to tension; that where desegregation has been done rapidly and completely, the amount of tension is minimized. She stated: "I think that the longer Nashville waits, the less likely it's going to be able to do its job as efficiently and as thoroughly and without less tension than it would have earlier because I think increasingly the longer we wait, the more difficulty and the more tension we vie. And that's in the nature of social change. That always happens. * * * I want to introduce another dimension, though, that I think hasn't been said. I think we have done an awful lot of discussion with reference to what this does for Negroes. As a social scientist, I am concerned about children. I'm concerned about what this does for all people. And in every community where I have been, the one thing that I want to report to this audience is the number of happy white mothers and white children who say that for once 'I can enter as a citizen and feel whole and complete. No longer do I feel guilty.' And one of the things that we have to face, and that is that we are now moving into a world in which there is no place really for the perpetuation of the kind of society which we have. The largest percentage of our people over this world are now colored people. It is unfair to children to give them a false conception of the world in which we now live."

Mrs. Valien testified that she thought Nashville should desegregate its schools, at that time, totally and completely. She considered that the plan should not permit transfers of students, as presently provided, because it was wrong, "sociologically, psychologically, and every other way."

Mr. Ennix, the Negro member of the School Board, opposed the plan because he felt that the Board was not proceeding with all deliberate speed. He had submitted to the Board a plan to desegregate, first, the grades from the first to the sixth; after that, the junior high schools; and after that, the senior high schools. He suggested a two- or three-year stage. At first, he had advocated immediate and complete desegregation, but after 1957, he thought a slower plan was wise, although not a grade-by-grade plan. He considered that the other members of the Board had acted in good faith. He and other members of the Board had often sharply differed on other matters and he always had full opportunity to state his point of view in the meetings, where matters were the subject of free and general discussion by all those present. "I think they were conscientious about what they were saying, and I certainly was conscientious about mine. * * * I think that the Board members, each one of them, conscientiously feel that it is best to go grade for grade."

The district court, in its findings, stated that the Superintendent of Schools, the former Superintendent of Schools, the Chairman of the Instruction Commission (who was also Acting Chairman of the Board of Education), and a principal of one of the elementary schools in which desegregation was first carried out, were unanimous in their sincere belief, based upon their years of experience and upon their intimate knowledge of the conditions in Nashville, that a sudden or abrupt transition to a desegregated basis would engender administrative problems of

such complexity and magnitude as to seriously undermine and impair the educational system of the City. The court further found that these four witnesses were convinced that the change-over from a segregated system of public education in that particular area was one of such drastic character, such a reversal of custom, tradition, and settled practice, that disagreement with it is pervasive, far-reaching, and deep-seated; that proper school administration requires that the School Board take into account the existence of this factor, not to accede to hostility or placate the opponents of desegregation, but in order to minimize the effects of opposition upon the efficiency of the schools; and that they support the School Board's plan primarily because they feel that it offers the best opportunity to bring about full desegregation harmoniously and without serious disruption of the educational program of the City.

In commenting in favorable terms upon the educational background and experience of appellants' witnesses, the court observed that they have had no direct or official connection with the public schools of Nashville, other than the single School Board member, and the court noted the disagreement among them as to the best plan to be followed: that Dr. Long and Mrs. Valien favored a plan which would require immediate desegregation in all of the public schools of the City; that Dr. Preston Valien, on the other hand, advocated a plan which would accomplish desegregation on the basis of administrative units, that is, first, the elementary schools would be desegregated, then the junior high schools, and finally, the high schools; and that Mr. Ennix first favored a plan of total and immediate desegregation, but that his views had since been changed to support the administrative unit plan advocated by Dr. Valien, or some gradual plan of a similar nature.

Holding that the appellees had carried the burden of proof of establishing the validity of the School Board's

plan, and that it should, therefore, be approved, the court, in its opinion, declared that "it is not the business of the Federal Courts to operate the public schools and they should intervene only when it is necessary for the enforcement of rights protected by the Federal Constitution. If the judgment of the School Board was clearly erroneous, or if it was not supported by the evidence, the Court would be justified in finding that the defendants had not carried the burden of proof resting upon them and that the School Board's plan should be disapproved. However, where in this case, the judgment of the School Board is supported by the clear preponderance of the evidence, it would be an unwarranted invasion of the lawful prerogatives of the legally constituted school authority if the Court should undertake to set its judgment aside and substitute some other plan. Admittedly the problem is not susceptible of an easy solution. The Supreme Court of the United States has made it clear that adjustment must be made in accordance with the exigencies of each case, and that the concept of 'all deliberate speed' is a flexible one. For this reason decisions applying the desegregation doctrine in other cities or areas where different conditions obtain are of little value. Local conditions call for the application of a local remedy.

"In approving the present plan no denial of the constitutional rights of the plaintiffs or others similarly situated is involved. Such rights are distinctly recognized and the plan contemplates their full enforcement and application in accordance with a time schedule which though protracted for the best interests of the school system as a whole is nevertheless definite and unambiguous. Full desegregation is not denied. It is merely postponed."

Cases involving desegregation, like other cases, depend largely on the facts. While the law has been stated, perhaps, as definitely as it can be stated at the present time,

by the Supreme Court, nevertheless, its application depends upon the facts of each particular case. "[Because] of the great variety of local conditions, the formulation of decrees in these cases presents problems of considerable complexity." *Brown* v. *Board of Education*, 347 U. S. 483, 495. "'Full implementation of these constitutional principles may require solution of varied local school problems; school authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles. Because of their proximity to local conditions and the possible need for further hearings, the courts which originally heard these cases can best perform this judicial appraisal.

"In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs." *Brown* v. *Board of Education*, 349 U. S. 294, 299, 300. The court further went on to say that at stake was the personal interest of the plaintiffs in admission to the public schools as soon as possible on a non-discriminatory basis; that effectuating this interest may call for elimination of a variety of obstacles in making the transition; that courts of equity may properly take into consideration the public interest in the elimination of such obstacles; that, once a start is made, the courts may find that additional time is necessary to carry out the ruling in an effective manner.

"'Of course, in many locations, obedience to the duty of desegregation would require the immediate general admission of Negro children, otherwise qualified as students for their appropriate classes, at particular schools. On the other hand, a District Court, after analysis of the relevant

factors (which, of course, excludes hostility to racial desegregation) might conclude that justification existed for not requiring the present nonsegregated admission of all qualified Negro children. In such circumstances, however, the courts should scrutinize the program of the school authorities to make sure that they had developed arrangements pointed toward the earliest practical completion of desegregation, and had taken appropriate steps to put their program into effective operation. It was made plain that delay in any guise in order to deny the constitutional rights of Negro children could not be countenanced, and that only a prompt start, diligently and earnestly pursued, to eliminate racial segregation from the public schools could constitute good faith compliance." *Cooper* v. *Aaron*, 358 U. S. 1, 7.

In its opinion in the foregoing case, the Supreme Court referred to another Aaron case which had gone up from the district court, and had been affirmed by the Court of Appeals, 243 F. 2d 361, from which judgment no review had been sought in the Supreme Court. In the opinion in this latter Aaron case, the district court had relied upon, and quoted from the opinion of the three-judge court, presided over by Judge John J. Parker, sitting in the Eastern District of South Carolina, in the case of *Briggs* v. *Elliott*, 133 F. Supp. 776, in which that court said, with reference to the rule announced by the Supreme Court in the desegregation cases:

> "It has not decided that the federal courts are to take over or regulate the public schools of the states. It has not decided that the states must mix persons of different races in the schools or must require them to attend schools or must deprive them of the right of choosing the schools they attend. What it has decided, and all that it has decided is that a state may not

deny to any person on account of race the right to attend any school that it maintains. This, under the decision of the Supreme Court, the state may not do directly or indirectly; but if the schools which it maintains are open to children of all races, no violation of the Constitution is involved even though the children of different races voluntarily attend different schools, as they attend different churches. Nothing in the Constitution or in the decision of the Supreme Court takes away from the people freedom to choose the schools they attend. The Constitution, in other words, does not require integration. It merely forbids discrimination. It does not forbid such segregation as occurs as the result of voluntary action. It merely forbids the use of governmental power to enforce segregation. * * * Because of the nature of the problems and the local conditions, the school authorities often find that action taken by other school districts is inapplicable to the facts with which they are dealing. * * * [The] free public schools must be maintained and operated as a racially nondiscriminatory system. During the period of transition from a segregated to a nonsegregated system, the school authorities must exercise good faith. They must consider the personal rights of all qualified persons to be admitted to the free public schools as soon as practicable on a nondiscriminatory basis. The public interest must be considered along with all the facts and conditions prevalent in the school district. Educational standards should not be lowered. If the school authorities have acted and are proceeding in good faith, their actions should not be set aside by a court so long as their action is consistent with the ultimate establishment of a nondiscriminatory school system at the earliest practicable date." *Briggs v. Elliott, supra*, 864, 865.

In the Aaron case, on appeal to the Court of Appeals for the Eighth Circuit, *Aaron* v. *Cooper*, 243 F. 2d 361, the court said: "The District Court's approval of the three-phase plan for integration came only after a finding of utmost good faith on the part of the school authorities, which finding is not challenged in these proceedings. * * * During the trial * * * the superintendent gave convincing and competent testimony to the effect that under existing conditions gradual integration of the schools was administratively advisable. Desirability of gradual as opposed to immediate integration was premised on factors referred to in the second Brown decision. The superintendent's testimony was not contradicted." Referring to numerous cases where the federal courts had used their injunctive powers to speed up, or effectuate integration, the court observed: "These decisions serve only to demonstrate that local school problems are 'varied' as referred to by the Supreme Court," and that what would be a reasonable amount of time to effect complete integration in one city or area, might be unreasonable in another. The court continued:

> "It was on the basis of such 'varied' school problems that the Supreme Court in the second Brown decision remanded the cases there involved to the local District Courts to determine whether the school authorities, who possessed the primary responsibility, have acted in good faith, made a prompt and reasonable start, and whether or not additional time was necessary to accomplish complete desegregation. The question of speed was to be decided with reference to existing local conditions. There is here unqualified basis for the District Court's conclusions that the proposed plan constitutes a good faith, prompt, and reasonable start toward full compliance with the Supreme Court's mandate. Accordingly, we cannot say,

> even if we were so minded, that the District Court's conclusions were entirely erroneous and should be set aside. Nor can we say that a gradual program of integration beginning at the high school level, and ultimately encompassing all grades, is an unreasonable one."

The complaint of appellants is that the plan does not conform to the mandate that desegregation take place with all deliberate speed. As Mr. Justice Frankfurter said in his concurring opinion in *Cooper* v. *Aaron*, *supra*: "Only the constructive use of time will achieve what an advanced civilization demands and the Constitution confirms." In the Court of Appeals, in *Aaron* v. *Cooper*, 243 F. 2d 361 (C. A. 8), it was observed that a reasonable amount of time to effect complete integration, in certain places, might be unreasonable in other places. It was said, in another case, that "a good faith acceptance by the school board of the underlying principle of equality of education for all children with no classification of race might well warrant the allowance by the trial court of time for such reasonable steps in the process of desegregation as appear to be helpful in avoiding unseemly confusion and turmoil." *Orleans Parish School Board* v. *Bush*, 242 F. 2d 156, 166 (C. A. 5).

As to the prospect of shortening the time proposed in the plan, it was said by the Court of Appeals of the Eighth Circuit, in *Aaron* v. *Cooper*, 243 F. 2d 361:

> "It may well be, in the light of future events, that the proposed program of integration extends over too long a period and that complete integration of all grades could be effected in a shorter space of time than now anticipated by the board. In that regard, it will be noted that the District Court in its order provided for retention of jurisdiction as directed by the

Supreme Court in the second Brown decision. It may be that in the future as the plan of integration begins to operate, a showing could then be made to the effect that more time was being taken than was necessary. Upon such a finding, the District Court would have the power to see that the plan of gradual integration was accelerated at a greater rate than now proposed. That remains for future determination.

"Jurisdiction of this case shall be retained by the District Court to insure full opportunity for further showing in the event compliance at the 'earliest practicable date' ceases to be the objective." *Aaron* v. *Cooper*, 243 F. 2d 361, 363, 364 (C. A. 8).

The findings of the district court were sustained by the evidence. There is no claim that the Board of Education did not act in good faith. The plan is supported by practically all of the teachers in the schools. The reasons for the support of the plan were clearly given by the Superintendent of Schools, the former Superintendent of Schools, by the Acting Chairman of the Board of Education, and by one of the most experienced principals and teachers where the desegregation plan was operating. Among those reasons, including difficulties arising from the recruitment of teachers, was the most persuasive one —that children in the first grade had no sense of discrimination; that as the classes of Negro and white children progressed year by year up through high school, they would know no feelings of racial discrimination, until the entire school system had been harmoniously integrated. One may disagree with the gradual process, but we cannot say that such a plan is so unreasonable that the judgment of the district court approving the plan, in the light of the evidence before it, should be reversed as clearly erroneous.

Also, it is to be said that this year, the first three grades of all public schools in Nashville will have been desegregated, leaving, at most, a nine-year period thereafter for complete integration. Moreover, it may be, as said in *Aaron* v. *Cooper*, 243 F. 2d 361 (C. A. 8), that in the light of future events, the proposed program of integration extends over too long a period and that a complete integration of all grades could be effected in a shorter space of time than now contemplated by the Board. If in the future as the program continues, it could be shown that more time was being taken than necessary, the district court would have the power to see that the plan was accelerated. It is for that reason, principally, that jurisdiction is retained by the district court to insure a full opportunity for a further showing, in the event that compliance with the Supreme Court mandate for desegregation at the earliest practicable date ceases to be the objective of those in positions of authority.[1]

We cannot say that the district court's conclusions, in the instant case, were entirely erroneous, and, for that reason, should be set aside; nor can we say that the gradual program of integration beginning in the first grade, and ultimately encompassing all grades, is clearly an unreasonable one. Even were we inclined to differ with the program, and even though we felt that it was too gradual in its application, we could not say that the judgment approving the plan was clearly erroneous, and that the plan, in this regard, was not reasonable.

We come, then, to the transfer provision of the plan, allowing the voluntary transfer of white and Negro

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[1] In *Aaron* v. *Cooper*, 143 F. Supp. 855, the plan for integration extended over seven years; in *Evans et al.* v. *Buchanan et al.*, F. Supp. (D. C. Del.), decided April 24, 1959, the plan for integration starts, like the instant case, in the first grade, and proceeds a grade each year until the entire twelve grades are desegregated.

students, who would otherwise be required to attend schools previously serving only members of the other race; and allowing the voluntary transfer of any student from a school where the majority of the students are of a different race. This provision does not fall within the ban of the maintenance of segregated public schools by cities where permitted—though not required—by statute, such as was condemned by the Supreme Court in *Brown* v. *Board of Education*, 347 U. S. 483. The district court, in the instant case, considered that, in accordance with the reasoning in *Briggs* v. *Elliott*, 133 F. Supp. 776 (D. C. S. C.), the transfer provisions did not violate the equal protection clause of the Fourteenth Amendment. In the Briggs case, it was declared, as we have heretofore mentioned, that the Supreme Court has not decided that the states must deprive persons of the right of choosing what schools they attend, but that all it has decided is that a state may not deny to any person, on account of race, the right to attend any school that it maintains. "This," said the court, as we have previously quoted, on another aspect of this case, "under the decision of the Supreme Court, the state may not do directly or indirectly; but if the schools which it maintains are open to children of all races, no violation of the Constitution is involved even though the children of different races attend different schools. * * *." Appellants say that the transfer plan is only a scheme to evade the decisions of the Supreme Court. In *Cooper* v. *Aaron*, 358 U. S. 1, 17, it was said: "In short, the constitutional rights of children not to be discriminated against in school admission on grounds of race or color, declared by this court in the Brown case, can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly by them through evasive schemes for segregation whether attempted 'ingeniously or ingenuously.'" There is no evidence before

us that the transfer plan is an evasive scheme for segregation. If the child is free to attend an integrated school, and his parents voluntarily choose a school where only one race attends, he is not being deprived of his constitutional rights. It is conceivable that the parent may have made the choice from a variety of reasons—concern that his child might otherwise not be treated in a kindly way; personal fear of some kind of economic reprisal; or a feeling that the child's life will be more harmonious with members of his own race. In common justice, the choice should be a free choice, uninfluenced by fear of injury, physical or economic, or by anxieties on the part of a child or his parents. The choice, provided in the plan of the Board, is, in law, a free and voluntary choice. It is the denial of the right to attend a nonsegregated school that violates the child's constitutional rights. It is the exclusion of children from such a school that "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone," as observed in *Brown v. Board of Education*, 347 U. S. 483, 494. Such may be the tragic result, when children realize that society is imposing a restriction upon them because of their race or color. The Supreme Court remarked in the foregoing case that the effect of the separation of students because of race was "well stated" by the district court in the case, then on review, when it declared:

> "Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of law; for the policy of separating the races is usually interpreted as denoting the inferiority of the Negro group. A sense of inferiority affects the motivation of the child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard]

> the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system."

Nevertheless, as stated in *Brown* v. *Board of Education*, 139 F. Supp. 469, 470, subsequent to the decision of the Supreme Court in the prior Brown case:

> "Desegregation does not mean that there must be intermingling of the races in all school districts. It means only that they may not be prevented from intermingling or going to school together because of race or color.
>
> "If it is a fact, as we understand it is, with respect to Buchanan School that the district is inhabited by colored students, no violation of any constitutional right results because they are compelled to attend the school in the district in which they live."

While, in the instant case, the parent makes the choice for the small child, that is the only reasonable method, if such a choice may be made. We see no deprivation of right, under the evidence before us. Doubtlessly, fewer Negro children, or their parents, will avail themselves of the transfer provisions, as grade after grade becomes integrated, and more Negro children attend such desegregated schools as time goes on. We are not informed by the record how much such attendance has increased with the additional desegregation that has taken place since the hearing. But if it should appear, upon a showing, that there are impediments to the exercise of a free choice, and that a change should be made in the plan to carry out, in good faith, and with every safeguard to the children's rights, the mandate of the Supreme Court, the district court, having retained jurisdiction during the entire period

of the process of desegregation under the Board's plan, shall make such modification in its decree as is just and proper. On the record before us, the judgment of the district court does not deprive any of the children of equal protection under the Fourteenth Amendment.

We consider, then, the issue that is raised upon cross appeal: whether the Fourteenth Amendment is violated by a plan, authorized by state statute, in which local school boards may provide separate schools for Negro and white children, whose parents voluntarily elect that such children attend school with members of their own race.

The district court held that the statute authorizing the maintenance of separate segregated schools was antagonistic to the principles declared by the Supreme Court in *Brown* v. *Board of Education*, 347 U. S. 483, and *Brown* v. *Board of Education*, 349 U. S. 294, and, therefore, was unconstitutional. The district court referred to the decisions in the above cases in which it was held that segregation of white and Negro children in the public schools of the state, solely on the basis of race, pursuant to state laws permitting or requiring such segregation in segregated schools, denied the Negro children the equal protection of the laws guaranteed by the Fourteenth Amendment. The district court held that the state statute in question was invalid in providing for separate schools for white and Negro children whose parents or guardians voluntarily elect that such children attend schools with members of their own race; that the statute providing for a census and for separate schools for Negro children, whose parents so elected, would be contrary to the Constitution since such schools would not only be separate, but separated because of race; that the separation, once made, would be compulsory; and that after such election, no Negro student would have the right to attend a school for white children, solely because of his race, nor could any white child, after

an election, ever attend a school which was attended by Negro children. The Constitution prohibits the states from maintaining racially segregated public schools. *Bolling* v. *Sharpe*, 347 U. S. 497, 500.

The argument that the statute contemplated voluntary action was answered by the district court in its opinion by the statement that the statute provided for the maintenance of segregated schools for Negro and white children, from which the children of the other race were excluded; that the statute further provided that, after a census of parents of school children had been taken, and preferences for such segregated schools ascertained, those schools would be required to be maintained thereafter as separate and segregated schools; and that after an election had once been made, it was binding on the child for the future. The court pointed out that the transfer system, which it had approved, giving Negro students and white students an equal right to transfer from one school to another, was a limited right, and the court felt that it was a reasonable provision. It did not envisage the maintenance of schools from which students could be excluded by the authorities, because of their race.

The district court held that it was unnecessary to refer the issue of the constitutionality of the statute to a three-judge court, since the statute in question was patently and manifestly unconstitutional on its face, in the light of the decision of the Supreme Court in the two *Brown* cases above cited; and we concur with the determination of the district court in this regard.

The final issue is raised by the brief and argument of the *amicus curiae*: whether, absent appropriate legislation by Congress, for the enforcement of the integration of races in the public schools of the several states, the courts of the United States have power to compel, by court order, the integration of the races in such schools.

The contentions advanced in this argument resolve themselves into the proposition that, as the *amicus curiae* states it, "The decision of the *Brown* case does not rise to the quality of 'Law of the Land.'"

In *Cooper* v. *Aaron*, 358 U. S. 1, 18, the Supreme Court, speaking in an opinion, unusual in that it was issued under the names of all the justices, said:

"Article VI of the Constitution makes the Constitution the 'supreme Law of the Land.' In 1803, Chief Justice Marshall, speaking for a unanimous court, referring to the Constitution as 'the fundamental and paramount law of the nation,' declared in the notable case of *Marbury* v. *Madison*, 1 Cranch 137, 177, that 'It is emphatically the province and duty of the judicial department to say what the law is.' This decision declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system. It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land, and Article VI of the Constitution makes it of binding effect on the States 'any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.' Every state legislator and executive and judicial officer is solemnly committed by oath taken pursuant to Art. VI, cl. 3, 'to support this Constitution.' Chief Justice Taney, speaking for a unanimous Court in 1859, said that this requirement reflected the framers' 'anxiety to preserve it [the Constitution] in full force, in all its powers, and to guard against resistance to or evasion of its authority, on the part of a State . . .' *Ableman* v. *Booth*, 21 How. 506, 524.

"No state legislator or executive or judicial officer can war against the Constitution without violating his under-

taking to support it. Chief Justice Marshall spoke for a unanimous court in saying that: 'If the legislatures of the several states may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the constitution itself becomes a solemn mockery * * *.' *United States v. Peters*, 5 Cranch 115, 136."

The argument of the *amicus curiae* must be held to be without merit in law.

In accordance with the foregoing, the judgment of the district court is affirmed, on the findings of fact, conclusions of law, and opinion of Judge William E. Miller.

Judgment

No. 13,748

(Filed June 17, 1959)

Appeal from the United States District Court for the Middle District of Tennessee.

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Tennessee, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1959.

No. 477.

ROBERT W. KELLEY et al.,
Petitioners,

v.

BOARD OF EDUCATION OF THE CITY OF NASHVILLE, DAVIDSON COUNTY, TENNESSEE, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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OPINIONS BELOW.

The opinions below are appropriately cited in the Petition.

JURISDICTION.

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED.

We do not agree that the question presented for review is appropriately stated in the Petition and we submit the following as the basic question to be decided:

Whether the Supreme Court should (1) overrule its holding in **Brown v. Board of Education**, 349 U. S. 294, that district courts with proximity to local conditions are the appropriate judicial agencies to fashion and effectuate equitable decrees in segregation suits, and (2) examine again the conflicting evidence and appraise the complex facts to determine whether the lower courts have fashioned an equitable decree giving appropriate relief in approving a plan for gradual (grade by grade) desegregation, with voluntary transfers available to students who are a minority in their school zones, **thereby disregarding the concurrent findings of the District Court and Court of Appeals?**

STATEMENT.

The Petition for Certiorari adequately states the proceedings in the courts below, but it does not contain a fair or accurate summary of the oral testimony in the District Court. Because separate and able opinions of the Court of Appeals and of the District Court contain such summaries, we shall not unduly lengthen this Reply Brief with a new summary, but we refer to those mentioned as fully and fairly summarizing the evidence. In two opinions which must be considered together (R. 241a), the District Court made adequate and accurate findings (R. 46a and 236a). The Court of Appeals, holding that the District Court's conclusions were not erroneous and should not be set aside (Appendix to Petition, 73) did not stop with such findings. Its unanimous opinion included an original and complete summary of all the evidence (Appendix to Petition, 46-65). Although the opinions of the Court of Appeals and of the District Court are entirely distinctive and individual, they contain findings which are substantially identical and constitute concurrent findings.

Such summary of the testimony as the Petition contains is also misleading in the following particulars:

1. The Petition, p. 9, refers to the entire testimony in the District Court and with respect to it states that "with the exceptions set forth hereafter this testimony was concerned largely with hostility or antipathy to desegregation." The **only** exceptions "set forth hereafter" are on p. 13 and refer to "homogeneous groupings", "teacher recruitment", and "difficulties (of) the new racial transfer plan". To show the inaccuracy of the assertion that all other testimony was concerned largely with hostility or antipathy to segregation, we quote from the opinion of the Court of Appeals the following excerpts not "set

forth hereafter" in the Petition and not concerned with hostility to desegregation:

(a) ". . . the Superintendent of Schools of the City of Nashville called together all of the principals of the 38 elementary schools, announcing to them the necessity of submitting a plan for desegregating the remaining eleven grades. He commenced by stating that he had great respect for their judgment; that they were close to the entire matter; that they were interested in the children; and that he would like to have their suggestions as to the best plan to be adopted.

The principals appointed a committee of themselves to draw up a questionnaire, which all principals were invited to answer, without disclosing their names. The questionnaires were, accordingly, answered by the principals, and thereafter submitted to the Superintendent of Schools. In these replies to the questionnaires, one principal advocated immediate desegregation of all grades in all schools. Thirty-seven principals advocated a gradual plan, or a year-by-year plan" (Appendix to Petition, p. 48).

This excerpt from the opinion is based on testimony in the Record, pp. 109a-112a.

(b) "He (Chairman of School Board) felt that the plan, starting with the first grade, and continuing each year up another grade, would be successful. The Negro and white children would already be a part of the class when it went into the higher grade. They would keep their achievement level as they went through their school years; they would have gone through the same educational experiences, from the first grade up to the twelfth grade, year by year. For these reasons, the Chairman felt that the year-by-year plan was the best that could be devised. He stated that consideration had been given to a plan

to desegregate first the twelfth grade, then the eleventh, and so down, but the Superintendent had expressed the opinion that such a plan was educationally unsound; and the Board felt that, because of the transfer provisions of the plan, there would be no desegregation whatever in those grades, and that such a plan would be trying to get around the court order, and we were not trying to do that. We were trying to abide by the court ruling, and not try to get around it. So we switched ends then and started to try to work out the best we could from an educational standpoint.'" (Appendix to Petition, p. 52.)

This excerpt from the opinion is based on testimony in the Record, pp. 133a-134a.

(c) "Miss Brent (school principal for nineteen years) further observed, in her testimony: 'To me, integration and desegregation are not the same thing, and we would like very much at the end of 11 years, or however many years it takes, to feel that the schools are truly integrated, that it's not just a question of their being desegregated. That feeling will have to come from the hearts of people. It cannot be forced, and it certainly cannot be thrust upon them in a hurry. In the second place, I feel that little children, for instance, these children in the first grade, now are absolutely accustomed to having the Negro and the white child right there together. They play together. They eat together. Everything goes along just the same. There's no difference whatsoever made. Well, if that group moves on next year to the second grade, they will still be accustomed to that. The children that are coming in in the first grade naturally expect their group to be desegregated. If you jump and begin to take children in

higher grades, you are going to double your trouble. I firmly believe that it is the only plan. . . . We firmly believe now that they have a foundation that will prepare them to go along into the second grade with the white children. They will the next year be able to progress. There will be no differences in their (shall we say) background. We feel that educationally it will be the best thing for the child, and, after all, that is what we are concerned with. We leave the outside trouble to the policemen.'" (Appendix to Petition, p. 54.)

This excerpt from the opinion is based on testimony in the Record, pp. 154a-155a.

(d) "He (Superintendent of Schools) referred to a difference in the achievement level of pupils in the same grade and stated that, on the basis of evidence—test results—the teachers know that, in the field of arithmetic, for example, in the eighth grade, the level of achievement of the white children is two and a half years above that of the Negro children, and that that constituted a teaching problem. He stated that the schools' psychological testing service in 1954-55 released its publication showing that fact, and other facts relating to it; that the difference in the achievement level of the Negro and white students varied in certain subjects, but showed in the sixth grade, a difference of about two years and some months, and a difference in the achievement level, in the fourth grade, of about one year." (Appendix to Petition, p. 57.)

This excerpt from the opinion is based on testimony in the Record, pp. 38b-39b.

2. The Petition, p. 14, after stating that petitioners offered four witnesses, then says that "these witnesses

testified that experience with desegregation in several localities demonstrated that delay increases rather than decreases community antagonism." To the extent that the quoted statement contains or permits the inference that all four of petitioners' witnesses so testified, it is misleading.

One of petitioners' witnesses, C. L. Ennix, the Negro member of the Nashville School Board, did not profess any information or opinion with respect to segregation in other localities. Far from testifying that delay increases antagonism, he advocated a gradual plan, but not a twelve-year plan (R. 222a). Another of petitioners' witnesses, Preston Valien, while condemning "indecision" suggested a gradual plan "over a short period of time" (R. 207a).

SUMMARY OF ARGUMENT.

In approving a plan for grade by grade desegregation with voluntary transfers available to a student who otherwise would be required to attend a school or a grade as one of a racial minority, the District Court and the Court of Appeals carefully applied the principles laid down by this Court in **Brown v. Board of Education**, 349 U. S. 294. The Petition, therefore, really asks this Court to lay down new and different principles to control the lower courts or to appraise the concurrent findings in the individual case to see if the lower courts have granted the most appropriate relief.

There is no conflict of decisions. Three different Courts of Appeals (Fourth, Sixth and Eighth Circuits) have approved plans for gradual desegregation and no Court of Appeals has reversed the judgment of a District Court approving a gradual plan.

The transfer provisions of the plan are valid. Every student has the right to attend the school of his zone but if he is one of a minority race in that school or in his grade of that school, he may voluntarily seek transfer to another school. Obtaining such transfer is a binding election for a single school year only. The transfer provisions primarily affect only those who invoke them.

Evidence of violence and hostility was not offered at the hearings on the merits of the plan for desegregation. The only significance of violence or hostility in this case is the fact that when it occurred the School Board showed its determination and good faith in carrying out its primary responsibility.

The criticism that under a grade by grade plan of desegregation those attending the public school when the plan begins will never fully enjoy its benefits in greater or lesser degree may be made as to any gradual plan. As to the individual (infant) plaintiffs, they did not request of the District Court preferential treatment for themselves.

ARGUMENT.

I.

There Is No Substantial or Undetermined Federal Question.

In **Brown v. Board of Education**, 349 U. S. 294, this Court reaffirmed its prior holding that enforced racial segregation in the public schools violates the constitutional principles of equal protection of the laws and of due process of law. In the same opinion, it was held that full implementation of the constitutional principles requires the solution of varied local school problems; that the school authorities have the primary responsibility for solving these problems; that the school authorities must make a prompt and reasonable start toward full compliance; that once such a start has been made, additional time necessary in the public interest may be allowed, with the burden on the school authorities to establish that such time is necessary; that the function of the courts is to decide whether the action of the school authorities constitutes good faith implementation; that because of proximity to local conditions the district courts can best perform this judicial appraisal; and that in effectuating the decrees the district courts will be guided by equitable principles, with practical flexibility in shaping remedies and adjusting and reconciling public and private needs.

Cooper v. Aaron, 358 U. S. 1, unanimously reaffirmed the basic decision of the Brown case and was no departure from it. The holding of Cooper v. Aaron added the principle to those enumerated that illegal, forcible interference by a state with a court approved plan of gradual desegregation is no justification for suspension of the plan.

In the case at Bar, the legal principles above stated have been expressly recognized and carefully applied by the

District Court (R. 46a, reported at 2 Race Rel. Law R. 21, and R. 236a, reported at 3 Race Rel. Law R. 652) and by the Court of Appeals for the Sixth Circuit (Appendix to Petition).

The Three Judge District Court which originally heard the Nashville segregation case held that the School Board was acting in good faith and with appropriate dispatch to arrive at a workable plan to solve its problems (R. 47a, reported at 139 F. Supp. 378). Later the single District Judge who tried the case on the merits held that the problems confronting the School Board were substantial and numerous and that it was acting in good faith to solve them (R. 46a, reported at 2 Race Rel. Law R. 21; R. 73a, reported at 2 Race Rel. Law R. 970; R. 94a, reported at 159 F. Supp. 272; Statement from the Bench, September 16, 1957, reported at 2 Race Rel. Law R. 980).

After one continuance requested and granted by the Three Judge Court, the case was set for trial. Prior to its hearing, the School Board adopted a plan desegregating the first grade. The District Court held that this constituted a prompt and reasonable first step (R. 64a).

Subsequently the Nashville School Board showed its good faith and determination when disorders by outside agitators were effectively halted by vigorous action of the local police and by a Federal injunction sought and obtained by the School Board and the City of Nashville (R. 60b and 63b). It is a fact of historic interest that the disorders in Nashville were contemporaneous with those in Little Rock, to-wit, in the first half of September, 1957, and that the Nashville School Board had obtained a temporary restraining order and subsequently a preliminary injunction prior to the time when the Governor of Arkansas was enjoined from interfering with the orders of the Federal Court and prior to the action of the Presi-

dent in sending Federal troops to Little Rock (R. 60b and 63b; **Cooper v. Aaron**, 358 U. S. 1).

The school authorities of Nashville recognized their primary responsibility and formulated a plan. The District Court, after receiving oral testimony at two hearings, approved the plan as constituting good faith implementation; and held the school authorities had carried the burden of showing that additional time was needed. (R. 46a, reported at 2 Race Rel. Law R. 21 and R. 236a, reported at 3 Race Rel. Law R. 652). The District Court found that the school authorities had supported their action "by the clear preponderance of the evidence" (R. 238a-239a). The Court recognized that it was not deciding new principles but applying those announced by this Court in the Brown case, that it was not passing on the adequacy of a plan in other cities or areas "where different conditions obtain" and that local conditions call for the application of a local remedy (R. 239a).

The Court of Appeals for the Sixth Circuit, like the District Court, considered all the principles announced by this Court in cases involving desegregation and applied them to the facts of this case (Appendix to Petition, 37). The Court of Appeals recognized that cases involving desegregation, like other cases, depend largely on the facts, and it carefully stated and considered the facts. The Court then said:

> "The findings of the district court were sustained by the evidence. There is no claim that the Board of Education did not act in good faith. The plan is supported by practically all of the teachers in the schools. The reasons for the support of the plan were clearly given by the Superintendent of Schools, the former Superintendent of Schools, by the Acting Chairman of the Board of Education, and by one of the most experienced principals and teachers where the desegre-

gation plan was operating. Among those reasons, including difficulties arising from the recruitment of teachers, was the most persuasive one—that children in the first grade had no sense of discrimination; that as the classes of Negro and white children progressed year by year up through high school, they would know no feelings of racial discrimination, until the entire school system had been harmoniously integrated. One may disagree with the gradual process, but we cannot say that such a plan is so unreasonable that the judgment of the district court approving the plan, in the light of the evidence before it, should be reversed as clearly erroneous.

Also, it is to be said that this year, the first three grades of all public schools in Nashville will have been desegregated, leaving, at most a nine-year period thereafter for complete integration. Moreover, it may be, as said in Aaron v. Cooper, 243 F. (2d) 361 (C.A. 8), that in the light of future events, the proposed program of integration extends over too long a period and that a complete integration of all grades could be effected in a shorter space of time than now contemplated by the Board. If in the future as the program continues, it could be shown that more time was being taken than necessary, the district court would have the power to see that the plan was accelerated. It is for that reason, principally, that jurisdiction is retained by the district court to insure a full opportunity for a further showing, in the event that compliance with the Supreme Court mandate for desegregation at the earliest practicable date ceases to be the objective of those in positions of authority.

We cannot say that the district court's conclusions, in the instant case, were entirely erroneous, and, for that reason, should be set aside; nor can we say that the gradual program of integration beginning in

> the first grade, and ultimately encompassing all grades, is clearly an unreasonable one. Even were we inclined to differ with the program, and even though we felt that it was too gradual in its application, we could not say that the judgment approving the plan was clearly erroneous, and that the plan, in this regard, was not reasonable" (Appendix to Petition, pp. 72-73).

When the Petition is analyzed, it will be seen that its real grievance is not that the District Court or the Court of Appeals violated the principles heretofore announced by this Court, but that this Court has announced such principles. Implicit in the Petition is the contention this Court ought to abandon or overrule its holding that district courts because of proximity to local conditions can best apply the flexible, equitable remedies and adjust public and private needs. The Petition really asks that this Court either lay down some new law to give guidance to the lower courts, as pages 15 and 34-35 thereof indicate, or assume the function of appraising the facts in every individual case to see if the district court and the court of appeals have erred in the application of the principles to the facts, as page 26 of the Petition intimates. In a separate portion of this Argument hereafter, we separately discuss the proposition that the transfer feature of the Nashville plan presents no substantial Federal question.

Thus, there is no important Federal question raised by the Petition unless it be the request that this Court should retract and depart from its holding in **Brown v. Board of Education**, 349 U. S. 294. We respectfully submit this does not raise a substantial or undetermined Federal question and the Petition should be denied.

II.

There Is No Conflict of Decisions.

Including the decision of the Court of Appeals for the Sixth Circuit in the present case, there have been three cases in different circuits where a court of appeals has reviewed a challenged plan for gradual desegregation. In every case there was affirmance of the judgment of a district court approving the gradual plan. The decisions, other than the case at Bar, were **Aaron v. Cooper**, 243 F. (2d) 361 (8 Cir. 1957), affirming the decision of the district court in the same styled case, reported 143 F. Supp. 855, and **Slade v. Board of Education of Harford County**, 252 F. (2d) 291 (4 Cir. 1958), cert. denied 357 U. S. 906, affirming the decision of the district court in the case of **Moore v. Board of Education of Harford County**, 152 F. Supp. 114.

In **Aaron v. Cooper** (1957), 243 F. (2d) 361, the Eighth Circuit affirmed a decision approving an eight year plan for desegregating the grade schools of Little Rock, Arkansas, and said:

> "Appellants cite to us several cases where Federal Courts have used their injunctive powers to speed up or effectuate integration . . . . These decisions serve only to demonstrate that local school problems are 'varied' as referred to by the Supreme Court. A reasonable amount of time to effect complete integration in the schools of Little Rock, Arkansas may be unreasonable in St. Louis, Missouri, or Washington, D. C. The schools of Little Rock have been on a completely segregated basis since their creation in 1870. That fact, plus local problems as to facilities, teacher personnel, the creation of teachable groups, the establishment of the proper curriculum in desegregated schools and at the same time the maintenance of standards of quality in an educational program may make the situa-

tion at Little Rock, Arkansas, a problem that is entirely different from that in many other places. It was on the basis of such 'varied' school problems that the Supreme Court in the second Brown decision remanded the cases there involved to the local District Courts to determine whether the school authorities, who possessed the primary responsibility, have acted in good faith, made a prompt and reasonable start, and whether or not additional time was necessary to accomplish complete desegregation. The question of speed was to be decided with reference to existing local conditions . . ." [243 F. (2d) 363-364].

In **Slade v. Board of Education of Harford County** (Fourth Circuit, 1958), 252 F. (2d) 291, the Court unanimously affirmed the decision of the trial Judge approving a seven year plan for desegregating grade schools in Harford County, Maryland. Under this gradual plan elementary schools were to be desegregated over a two year period and high schools were to be desegregated over a five year period. The Circuit Court said:

> "The facts are fully set forth in the opinion of the District Judge and we think that his discretion was properly exercised for reasons adequately stated in the opinion, to which nothing need be added."

In the opinion of the District Court, 152 F. Supp. 114, it was said:

> "The Harford County Board had sound reasons for making the transition on a year to year basis, so that most Negro children will have a normal high school experience, entering in the seventh grade and continuing through the same school.
>
> . . .
>
> This plan is different from any to which my attention has been called or about which I have read. It is an equitable way of handling the transition period."

The Petition, p. 35, asserts that prior decisions indicated a 12-year plan was not compliance with the law. There is no indication that the local school problems in those cases brought to the attention of the district court were substantially the same as, or comparable to, the problems existing in the City of Nashville. Aside from this, a decision of a district court in the Fourth Circuit **(Pierce v. Cabel County)** and of a district court in the Sixth Circuit **(Mitchell v. Pollack)**, not appealed from, do not constitute a conflict of decisions because they are, or may be, at variance with subsequent decisions of the Court of Appeals for their respective circuits.

III.

The Transfer Provisions of the Plan Are Valid.

The transfer provisions of the plan submitted by the School Board and approved by the courts below do not provide for nor contemplate any involuntary transfers of students. The plan provides that school zones or districts based upon location of school buildings and the latest scholastic census without reference to race will be established. The plan then declares the right of every student to attend the school designated for the zone in which he resides "subject to regulations that may be necessary in particular instances". At the hearing it was explained that the quoted qualification was made to take care of situations which would arise if an emergency, such as a fire-damaged school or one with pupil registration beyond its capacity, necessitated sending children temporarily to schools outside their zone.

Under the plan, transfer may be requested by a parent or person in *loco parentis* for the student, and only those children on whose behalf transfers are requested will regularly attend schools outside of their zone. Each stu-

dent has the right to attend the school of his zone, whether he be the only student of his race in that zone, whether it be a school previously used exclusively for students of a different race, or whatever the circumstances.

This right to attend the school of the zone in which the student lives is one that remains so long as residence in that zone also continues. One does not lose the right because he elects to transfer out for a particular school year.

If application for transfer is made and approved at the beginning of a school year, it is effective only for that school year and is not a permanently binding election. At the beginning of the next school year, the student, as of right and despite his prior voluntary transfer, may go to the school of his zone; or his parents may voluntarily seek another transfer for him.

The schools of Nashville operate on a school year basis, as distinguished from a semester basis or a term basis. This means that pupils are promoted only once a year, in the Spring when school closes (R. 25b). This fact explains why the school board does not, as of right, permit transfers after the school year begins, nor permit re-transfers. The election to transfer or not to transfer, once made, is binding for that school year.

The plan recognizes as valid conditions to support application for transfer (a) that a student would otherwise be required to attend a school previously serving only the other race, or (b) that a student would otherwise be required to attend a school where the majority of students in that school or in his grade are of a different race.

In Nashville in 1957, because of the composition of particular neighborhoods amounting to voluntary residential segregation, only 115 of the 1400 Negro students in the first grade were eligible under a zoning system to attend

schools previously attended only by white students; and only 55 of the 2,000 white students in the first grade were eligible to attend schools previously attended only by Negro students. As a practical matter, those eligible because of residence in a zone to attend its school are either very predominantly white or Negro.

The members of the School Board, with their intimate knowledge of local conditions and local sentiment, accurately foresaw that transfers would be preferred by nearly all of the small minority, white or Negro, who would otherwise be forced to attend school where the opposite race was strongly predominant. The School Board, complying in good faith with the constitutional mandate, also recognized that desegregation is not popular with a majority of the people of Nashville. The School Board, therefore, in its plan to abolish compulsory segregation included transfer provisions designed to reassure the troubled and affected parents that there would be no compulsory integration. Thereby it sought not to disrupt the educational program of the city, that is, it endeavored to "take into account the public interest in the elimination of such obstacles in a systematic and effective manner". (**Brown v. Board of Education**, 349 U. S. 294 at 305.)

The transfer provisions have application only when the parent of the student primarily affected invokes them. We, therefore, submit there is no constitutional problem under the equal protection of the laws clause.

As illustrative, let us consider the Negro pupils eligible by reason of their residential zone to attend a previously all white school. Most of them voluntarily elected to seek a transfer to a previously all Negro school. The constitutional rights of these transferees were not violated by the transfer provisions. They might have stayed in the school for their zone, but they elected to go elsewhere. Some of

these students, approximately ten percent of those eligible to attend previously all white schools, did not apply for transfers, and so they attended the school for their zone.

An argument predicated upon the unconstitutionality of the voluntary transfer provisions of the plan assumes that one student has a constitutional right that another student be compelled to attend school in his geographic zone. The argument further assumes that compulsory integration is required by the Fourteenth Amendment. This contention was effectively answered by the district court (R. 53a-54a) and by the Court of Appeals, as follows:

> "We come, then, to the transfer provision of the plan, allowing the voluntary transfer of white and Negro students, who would otherwise be required to attend schools previously serving only members of the other race; and allowing the voluntary transfer of any student from a school where the majority of the students are of a different race. This provision does not fall within the ban of the maintenance of segregated public schools by cities where permitted—though not required—by statute, such as was condemned by the Supreme Court in **Brown v. Board of Education**, 347 U. S. 483. The district court, in the instant case, considered that, in accordance with the reasoning in **Briggs v. Elliott**, 132 F. Supp. 776 (D. C. S. C.), the transfer provisions did not violate the equal protection clause of the Fourteenth Amendment. . . . Appellants say that the transfer plan is only a scheme to evade the decisions of the Supreme Court. . . . There is no evidence before us that the transfer plan is an evasive scheme for segregation. If the child is free to attend an integrated school, and his parents voluntarily choose a school where only one race attends, he is not being deprived of his constitutional rights. It is conceivable that the parent may have made the

choice from a variety of reasons—concern that his child might otherwise not be treated in a kindly way; personal fear of some kind of economic reprisal; or a feeling that the child's life will be more harmonious with members of his own race. In common justice, the choice should be a free choice, uninfluenced by fear of injury, physical or economic, or by anxieties on the part of a child or his parents. The choice, provided in the plan of the Board, is, in law, a free and voluntary choice. It is the denial of the right to attend a non-segregated school that violates the child's constitutional rights." (Appendix to Petition, pp. 73-75.)

IV.

Community Attitude to Desegregation.

The Petition, p. 21, by distortion of the record in this case, implies that "testimony of violence and hostility was admitted into evidence" to justify a gradual plan. Such is an erroneous and unfair presentation of the record and the Petition cannot and does not quote from any finding of fact or conclusion of law by the District Court to justify its contention, nor does it cite any testimony erroneously admitted either over objection or without objection.

At the first hearing with respect to a plan prior to any desegregation, and hence prior to any act of violence, the School Board offered testimony regarding its problems and why it needed to plan carefully and proceed gradually (R. 19b, et seq.). Later, the first grade was desegregated and there came public displays of disorder and violence. The School Board secured the vigorous cooperation of the local police to suppress the unlawful actions and on its own initiative sought and obtained a temporary restraining order and subsequently a prelimi-

nary injunction against the known violators (R. 60b and 63b).

Months later there came a final hearing by the District Court on the grade by grade plan (R. 105a, et seq.). Witnesses for the School Board unanimously and strongly supported the grade by grade plan. As found by the District Court:

> ". . . these witnesses, based upon their years of experience in education and upon their intimate knowledge of conditions in Nashville, sincerely believe that a sudden or abrupt transition to a desegregated basis would engender administrative problems of such complexity and magnitude as to seriously undermine and impair the educational system of the city (R. 237a). . . . They support the School Board's plan primarily because they feel that it offers the best opportunity to bring about full desegregation harmoniously and without serious disruption of the educational program of the city" (R. 238a).

For the record in the Court of Appeals plaintiffs did not consider the evidence offered at the collateral hearing for an injunction sufficiently significant to have any part of it printed in the Appendix, nor did the School Board; and hence this evidence is not in the record before this Court. On page 16 of their brief in the Court of Appeals, plaintiffs charged that the School Board "had sought delay in every stage of this litigation and had put forward schemes designed solely to evade compliance with desegregation". To refute the baseless charge that this School Board acted in bad faith, we referred, among other evidence, to the statement by the District Court at the hearing on injunction to the effect that the School Board had acted in good faith from the beginning and except for the firm action of local authorities the reign

of terror in Nashville would have been much worse than it was (2 Race Rel. Law R., 980-981).

The opinion of the Court of Appeals may not fairly be interpreted as justifying delay by community hostility, but rather as giving the background against which a school board devised and carried through without interruption its plan for desegregation. To the extent the Petition implies that members of a school board must close their eyes to public sentiment, we deny the implication finds support in **Cooper v. Aaron**, 358 U. S. 1, or elsewhere. If public attitudes are irrelevant to the question of how much time is necessary to an orderly transition to desegregation, then the difficulty of a problem has no connection with the time to be allowed for its solution. It is an obvious truth that whatever impairs or may adversely affect the educational system is the proper concern of the School Board. Such truth has application here. It is equally obvious that law and order cannot surrender to violence or the threat of violence. This principle has no application here and is brought forward in an attempt to divert attention from the realities.

V.

Rights of Individual Plaintiffs.

Attacking the gradual (grade by grade) plan, the Petition, pp. 17-20, asserts that such plan denies the named petitioners (children) the right ever to attend "a desegregated class in the public schools". The Petition does not and could not assert that the plan denies these children the right to attend a desegregated school system or even a desegregated school.

To the extent the individual plaintiffs are used as illustrative of a class—that is, those who will graduate before their grade is desegregated, the Petition makes a complaint

which can be directed against any gradual plan or any period of transition. When this Court recognized the possibility of a period of transition, it inferentially authorized some segregation along with desegregation during the period of transition and when the evidence justified it. Because some pupils finish grade schools every year, the objection now made can be made with respect to every gradual plan, whether a three step plan, a seven year plan, an eight year plan, or a grade by grade plan.

To the extent the Petition claims for the individual plaintiffs greater rights than those claimed for other students in the same grade, i. e., if the Petition urges that an exception in their individual favor should have been made, the short and decisive answer is: Petitioners did not request nor even suggest this exception by pleading, testimony, brief, oral argument or otherwise in the District Court. At the final hearing with respect to the plan on its merits, plaintiffs did not offer evidence as to their then status in the grade schools and did not request the District Court to give them exceptional status. [Cf. **Board of Education of St. Mary's County v. Groves**, 261 F. (2d) 527.] For ought that appears in the present record, every individual petitioner may have graduated from grade school or moved away from Nashville or changed the zone of his residence.

VI.

Conclusion.

Because we believe the opinions below clearly show that the challenged decree was not erroneous and each of these opinions at this time constitutes an effective brief on the merits in our favor, we shall not further lengthen this reply brief to fortify our contention that the decision below is correct on the merits. However, we do not understand the

correctness of such decision is the basic question which this Court will decide at this time.

A school board acting in good faith and confronted with serious problems has adopted a plan for desegregation **and its plan is working.** The District Court, after hearing oral and conflicting testimony, approved the plan. The Court of Appeals, after carefully reviewing and summarizing the record, affirmed.

If the law heretofore declared by this Court is to stand, and if this Court is not to assume the function in each case of deciding whether a plan of desegregation adopted by the school board is the best and most suitable one, then the Petition for the Writ of Certiorari ought to be denied.

Respectfully submitted,

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